Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CATHERINE L. HOY, Guardian for KEVIN A. BROWN,

Petitioner,

v.

STEVE A. SIMPSON, SHERIFF OF LOUDOUN COUNTY; DANIEL DONDERO; TRULA PEACH; LANCE SCHUL; JAMES DRUMMOND; SHANNON M. DALY; THE LOUDOUN COUNTY BOARD OF SUPERVISORS; MICHAEL COX; JACK BRADLEY; JEFFREY FRAGALA; Unknown Sheriff's Deputies,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether *City of Los Angeles v. Heller*, 475 U.S. 796 (1986), precludes liability for municipalities and supervisors in a civil rights failure-to-train case if a jury's verdict in favor of subordinates was based on the individual defenses of qualified immunity or lack of subjective intent under *Farmer v. Brennan*, 511 U.S. 825 (1994).

2. Whether a jury instruction on qualified immunity in a civil rights case is proper at all; and, if given, whether it can be harmless error when the jury returned general verdict forms that failed to distinguish qualified immunity from the merits.

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Petitioner, Catherine Hoy, guardian of her son, Kevin A. Brown, respectfully petitions the Court to issue a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

As explained below, due to defendants' fraudulent conduct, as found by the District Court during the pendency of the first appeal, this case was before the United States Court of Appeals for the Fourth Circuit twice, but there is only one opinion and judgment. The unpublished decision is reproduced in the Appendix at 1a-25a. There are no reported District Court opinions, but the pertinent rulings are reproduced in the Appendix at 26a-52a.

STATEMENT OF JURISDICTION

The Judgment of the United States Court of Appeals sought to be reviewed was entered on June 25, 1999. Petitioner's application for rehearing was denied on July 23, 1999. Appendix at 53a-54a.

The District Court had jurisdiction over this case under 28 U.S.C. §§ 1331 and 1343, because petitioner's claim under 42 U.S.C. § 1983 arose under the Constitution of the United States. The Court of Appeals had jurisdiction of the appeal of the final judgment of the District Court under 28 U.S.C. § 1291. This Court has jurisdiction over this case by writ of *certiorari* under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV, Section 1, of the Constitution of the United States provides, in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

Section 1983 of Title 42 of the United States Code provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

A. Factual Background.

On March 24, 1996, Kevin Brown was arrested for public drunkenness and taken to the Loudoun County (Virginia) Adult Detention Center ["the jail" hereafter]. He passed out during booking and was dragged to an isolation cell. Although Mr. Brown was severely intoxicated, the deputies who performed the intake at this small county jail did not do a medical screening, and the computerized form that was generated for Mr. Brown's admission stated (incorrectly) that he was not under the influence of alcohol.

Mr. Brown remained unconscious in the isolation cell for the next twenty-two hours, during which time at least seven attempts by sheriff's deputies to rouse him (even by shaking and kicking) were unsuccessful. The deputies neither logged nor reported to supervisors that an inmate was unresponsive through two shifts, and no one called for medical evaluation or assistance.

At the end of the twenty-two hours, deputies noticed that Mr. Brown was having trouble breathing and was

vomiting blood. They summoned an ambulance, which transported Mr. Brown to a hospital, where it was clear that he had suffered a profound brain injury. He has remained in a persistent vegetative state since that time.[1]

B. Policy and Training Failures at the Loudoun County Jail.

The totality of the policies and procedures regarding intoxicated inmates at the Loudoun County Jail at the time of Kevin Brown's tragedy consisted of one sentence (italicized below) in a directive concerning the inmate count:

> It is important when counting inmates you always see some skin of the inmate to determine they are actually there. If asleep, you should also look for some signs of breathing or movement. *This is especially true of drunk or mentally disturbed inmates as these inmates are more prone to medical problems.*

No policies described intake procedures for intoxicated inmates, their monitoring (except to see if they are "breathing"), the risks of acute detoxification, logging or reporting to supervisors, or the summoning of medical evaluation or care — even though it was undisputed that upwards of 50% of new detainees at the jail are drunk. When asked about training in handling intoxicated inmates, the sheriff conceded that there had been none "specifically with regard to that issue."

The experts whose depositions were taken were unanimous that an intoxicated inmate, unresponsive to normal stimuli, presents a medical emergency. Even the expert retained by the defendants conceded that, if he had been informed as the jail's

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1. Mr. Brown's permanent brain damage was caused by anoxia (or loss of oxygen to the brain) when he aspirated vomit while unconscious, a common risk to severely intoxicated unresponsive individuals.

on-call doctor that an intoxicated inmate could not be awakened, he would have told the deputies to "call the rescue squad." Another expert said that Mr. Brown should never have been admitted to the jail because his condition exceeded the capability of its correctional staff.

The testimony of the deputies confirmed that they had received no training in the special handling of severely intoxicated inmates, the risks of detoxification, or that the inability to arouse them presented a medical emergency. They performed their rounds, found Mr. Brown to be breathing, and moved on — seeing nothing alarming in his prolonged unconsciousness.

Plaintiff's experts stated that the policy and training failures at the jail proximately caused Mr. Brown's coma. As explained below, the jury never heard these claims.

C. Procedural Background.

Petitioner, Catherine Hoy, as guardian for her son, brought a civil rights action under 42 U.S.C. § 1983, claiming deliberate indifference to Mr. Brown's serious medical needs, and asserting liability against the individual deputies, as well as against the sheriff and Loudoun County for policy and training failures. She also raised a pendent state cause of action for gross negligence.

The District Court denied defendants' motion to dismiss under F.R.C.P. 12(b)(6) for failure to state a claim, and discovery ensued. Later, the District Court granted summary judgment to the sheriff and to Loudoun County on the policy and training claims, and trial proceeded against the individual deputies on liability only, reserving the question of damages.

At the end of the trial, the defense argued to the jury that policies and training at the jail were not at issue and

that "none of the deputies [were] responsible for procedures at the jail" even if deficient. Counsel also asserted that plaintiff had failed to prove that the deputies' inactions were the proximate cause of Mr. Brown's coma.

The District Court instructed the jury on the elements of a civil rights deliberate indifference claim, including individual intent — "subjective awareness of [Mr. Brown's] known serious medical needs" — as framed by *Farmer v. Brennan*, 511 U.S. 825 (1994). It also charged the jury over plaintiff's objection to consider qualified immunity, but the general verdict forms did not separate the immunity question from the merits. *See, e.g.*, Appendix at 55a, *et seq.*

The jury returned a verdict for the deputies, finding that they were not deliberately indifferent to a "known" serious medical need and that they were not grossly negligent under state law. Petitioner appealed both the final judgment on the verdict and the summary judgment in favor of the supervisory and municipal defendants. (No. 97-1583).

During the pendency of that appeal, petitioner learned through the news media that the jail had been repeatedly cited by Virginia state authorities for inadequate policies and training, particularly in basic first aid.[2] This information, requested in discovery, was never produced. It was particularly relevant to the appeal, since the District Court had relied on a supposedly unblemished state accreditation of the jail and the absence of notice of the need to correct policies and training when it granted summary judgment for the supervisory and municipal defendants.

On petitioner's application, the Court of Appeals remanded the case on this issue to the District Court, which

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2. For example, six months after Mr. Brown's incident, only 5 of 30 deputies assigned to the jail were trained in basic first aid; and there had been virtually no turnover of staff in the interim.

vacated summary judgment, finding that defendants had fraudulently concealed the subject information. The District Court held that "evidence of a defect in policy" and "notice to policymakers" could create "genuine issues of material fact," and that the defendants' "misconduct . . . prevented the Plaintiff from fully presenting her case." Appendix at 29a-30a.

Petitioner amended her complaint to incorporate the new allegations. Inexplicably, the District Court then dismissed the amended complaint for failure to state a claim against the sheriff and the county under F.R.C.P. 12(b)(6). The Court of Appeals affirmed in a second, consolidated appeal (No. 98-2605). Although doubting that the amended complaint failed to state a claim, it held on the authority of *City of Los Angeles v. Heller*, 475 U.S. 796 (1986), that the verdict in favor of the deputies precluded action against the sheriff and the county.

The Court of Appeals likewise rejected petitioner's objection to the qualified immunity instruction as harmless error, holding that, because the jury had found no deliberate indifference, it "had no cause to consider the *subsequent* question of whether the defendants were entitled to qualified immunity." Appendix at 15a, 18a [emphasis supplied].

D. Summary of Errors Below.

The Court of Appeals erred: (1) in its application of *City of Los Angeles v. Heller*; and (2) in its finding of harmless error in the District Court's instruction on qualified immunity. The Court of Appeals, in effect, sanctioned a process that allowed the defense to obtain summary judgment for a supervisor and a municipality on policy and training claims by chicanery. It then permitted the defense to take advantage of such fraud to argue (successfully) that the remaining defendants should be exonerated because, by virtue of the

lack of official policy and training, they were not deliberately indifferent to a "known" risk under *Farmer v. Brennan* and also were entitled to the benefit of qualified immunity.

REASONS FOR GRANTING THE WRIT

The Court should review this case not just because the Court of Appeals was wrong, although petitioner submits that wrong it was — and not just because Mr. Brown's federal civil rights were violated without remedy, although unremedied they remain. Rather, the Court should grant the writ because the Court's *per curiam* decision in *City of Los Angeles v. Heller* ["*Heller*" hereafter] has fostered divergent interpretations of its holding in the lower courts, with resulting confusion in the application of civil rights law to supervisors and municipalities. Moreover, the question of whether juries should be instructed on qualified immunity in civil rights cases (and, if so, how) divides the lower courts and poses fundamental questions about the administration of justice similar to the qualified immunity questions raised in *Snyder v. Trepagnier*, __ U.S. __, 119 S. Ct. 863 (1999), in which *certiorari* was granted last term but was resolved without an opinion of the Court because the case settled after issuance of the writ. __ U.S. __, 119 S. Ct. 1493 (1999).

I.

THE COURT SHOULD RESOLVE THE LOWER COURT CONFUSION ARISING FROM ITS DECISION IN *CITY OF LOS ANGELES v. HELLER* REGARDING SUPERVISORY AND MUNICIPAL LIABILITY IN CIVIL RIGHTS CASES.

In *Heller*, the Court held that a jury verdict in favor of police officers in an excessive force case was dispositive of any liability of the supervisors and the municipality, if the jury "in fact" found that no constitutional tort had occurred. In the Court of Appeals decision on review, the Ninth Circuit had ruled that a jury finding for the officers did not "negate the existence of a

constitutional injury" attributable to the supervisory defendants, because the jury could have found that the officers were entitled to a defense of good faith. 475 U.S. at 798. The Court rejected this premise because "no issue of qualified immunity was presented to the jury," and juries are presumed to "act in accordance with the instructions given them." *Id.*

Although *Heller* has been widely cited, its *per curiam* holding has not been limited to cases where the basis of a defense verdict for individual officers was so clear. The lower courts apply *Heller* in broadly different ways, including the interpretation adopted by the Fourth Circuit here.

In this case, the Court of Appeals cited *Heller* to preclude supervisory and municipal liability even though its jury, unlike the *Heller* jury, *was* instructed on qualified immunity. In addition, unlike in *Heller*, this jury's general verdict for the deputies did not necessarily mean that the jury found that no constitutional tort occurred, as explained below.

Petitioner sued for violation of her son's right to be free of deliberate indifference to his serious medical needs, as articulated in *Estelle v. Gamble*, 429 U.S. 97 (1976).[3] That Mr. Brown was injured was (and is) plain. The issue at trial was who, if anyone, was responsible: the sheriff's deputies before the jury or the absent supervisory and municipal defendants who failed to train the deputies or adopt appropriate policies. The application of *Heller* to these facts by the Court of Appeals below (and the conflicting interpretations of *Heller* by other

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3. *Estelle* applied the Eighth Amendment's prohibition against "cruel and unusual punishment" to convicted felons' claims of inadequate medical care. While the Eighth Amendment does not apply to pre-trial detainees like Mr. Brown, whose rights are adjudicated under the Due Process Clause of the Fourteenth Amendment — *Bell v. Wolfish*, 441 U.S. 520, 535 (1970) — the Court has held that such inmates' rights are "at least as great" as those having Eighth Amendment protection. *City of Revere v. Massachusetts General Hospital*, 463 U.S. 239, 244 (1983).

courts in similar cases) raises issues that did not exist at the time *Heller* was decided, due to several subsequent developments in civil rights law.

First, at the time of *Heller,* the Court had not decided *Canton v. Harris*, 489 U.S. 378 (1989), which extended *Monell*[4] liability against municipalities and supervisors in their official capacity for the custom and practice of failing to train subordinates.[5] Thereafter, the Court defined the subjective component of deliberate indifference claims in *Wilson v. Seiter*, 501 U.S. 294 (1991). It refined it further in *Farmer v. Brennan*, 511 U.S. 825 (1994), by requiring a civil rights plaintiff to show that *each* defendant being sued exhibited a conscious disregard of a known substantial risk to the plaintiff or those in like circumstances. 511 U.S. at 836-37.

It is apparent from the convergence of these two lines of authority (*Monell/Canton* and *Wilson/Farmer*) that *Heller*'s exoneration of supervisors and municipalities was on a collision course with developing law. If there is supervisory liability for policy and training failures and if untrained subordinates can defend themselves by claiming lack of subjective intent because they did not *know* of a substantial risk (such ignorance *caused* by their lack of training), then the premise of *Heller* that a verdict for subordinates "in fact" means that the jury found no constitutional tort no longer holds.

In short, the cause of action against the supervisors and the municipality is different than the claim against the subordinates. The state of mind among the defendants (the subjective element) is also quite different, when, as here, the sheriff and county were on notice of policy and training deficiencies and ignored

4. *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978).

5. The continuing viability of *Canton* claims was reaffirmed two terms ago in *Board of County Commissioners v. Brown*, __ U.S. __, 117 S. Ct. 1382, 1385 (1997).

them, while the guileless deputies maintained that they were merely following what little training they had. The problem is only aggravated when a jury instruction on qualified immunity is added to the mix. This immunity instruction issue, on which the lower courts are also split, is discussed in Part II of the Petition.

In the instant case, the Fourth Circuit ruled that, because the jury found that "none of the individual sheriff's deputies was deliberately indifferent . . . and . . . [Mr. Brown] suffered no constitutional deprivation, there simply is no basis for municipal liability. . . ." Appendix at 23a. This holding ignores the distinctions just discussed among the claims against the various hierarchy of defendants. It casts petitioner's lot with the holdings of those circuits that apply *Heller* broadly (too broadly, petitioner maintains), and not with those that limit *Heller* narrowly.[6]

The Third Circuit, in a high speed police pursuit case in which training was an issue, ruled that a favorable determination for the officers did not automatically preclude municipal liability for failure to train them. It observed, as argued above, that the standards of liability of the various defendants are different and that *Heller* "should not be read so broadly as to automatically preclude municipal liability" if individual officers are exonerated. *Fagan v. City of Vineland*, 22 F.3d 1283, 1291 (3d Cir. 1994).[7]

The Tenth Circuit had ruled similarly, in a pre-*Heller* case involving an intoxicated jail inmate who died in custody

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6. *Heller* was a *per curiam* summary reversal, without full briefing and oral argument. It therefore should be narrowly read and have limited precedential value. *See Edelman v. Jordan*, 415 U.S. 651, 671 (1974); *Garrison v. Texarkana*, 910 F. Supp. 1196, 1204 (E.D. Tex. 1995) (*Heller* "should be given a narrow reading").

7. This holding was reaffirmed in *Kneipp v. Teddler*, 95 F.3d 1199, 1212 n.27, 1213 (3d Cir. 1996).

under circumstances very similar to those of Mr. Brown, when it affirmed a jury verdict in favor of all the deputy defendants but against the county under *Monell*, stating that, "[a]lthough the acts or omissions of no one employee may violate an individual's constitutional rights, the combined acts or omissions of several employees acting under a governmental policy or custom may violate an individual's constitutional rights." *Garcia v. Salt Lake County*, 768 F.2d 303, 310 (10th Cir. 1985). In *Garcia*, the Court of Appeals found that the county's policy (like the one here) of allowing unconscious, intoxicated persons to be admitted to the jail was sufficient evidence of deliberate indifference to support a verdict against the municipality under *Monell*, even though (unlike here) the defendant deputies in *Garcia* had been trained in basic first aid. *Id.* at 308.[8]

On October 7, 1999, the Second Circuit relied on *Garcia* and also on another, pre-*Heller* case, *Anderson v. City of Atlanta*, 778 F.2d 678, 686 (11th Cir. 1985), in declining to preclude municipal liability simply because lower officials were cleared, writing that "under *Monell*, municipal liability for constitutional injuries may be found to exist even in the absence of individual liability." It also distinguished *Heller* on the ground that it applies only where "constitutional injury is caused solely by the named individual defendant." *Barnett v. Orange County Human Rights Commission*, __ F.3d __ (2d Cir. October 7, 1999) (*N.Y. Law Journal* at 34, October 21, 1999). Here, in contrast to *Heller*, the constitutional tort was caused by the *supervisor's* failure to adopt policies or to train their deputies regarding a known risk to intoxicated detainees. Supervisor's failure to adopt policies or to train subordinates with regard to a predictable risk is a different matter altogether than a case with injury caused solely by the subordinates.

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8. For another case sustaining a *Monell/Canton* claim against a county for the death of an intoxicated arrestee, *see Colle v. Brazos County, Texas*, 981 F.2d 237, 245 (5th Cir. 1993).

Most lower court decisions, however, apply *Heller* without such exacting analysis, almost as if findings for supervisors and municipalities were now talismanic whenever subordinates are cleared. The First Circuit, for example, has specifically declined to follow the Third Circuit's decision in *Fagan*. *Evans v. Avery*, 100 F.3d 1033, 1040 (1st Cir. 1996); *see also Willhauck v. Halpin*, 953 F.2d 689, 714 (1st Cir. 1991) ("where there are no constitutional violations by municipal employees there can be no claim of inadequate supervision or training"). Many other Courts of Appeals apply *Heller* as if it were an inflexible rule. *See Schulz v. Long*, 44 F.3d 643, 650 (8th Cir. 1995) ("It is the law of this circuit . . . that a municipality may not be held liable on a failure to train theory" where claims against the individual officers were dismissed)[9]; *Gazett v. City of Pontiac*, 41 F.3d 1061 (6th Cir. 1994) (determination in favor of individual defendant made it unnecessary to reach municipal liability issue)[10]; *Thompson v. Boggs*, 33 F.3d 847 (7th Cir. 1994) (verdict for officer in excessive force case precluded municipal liability).

Petitioner has no quarrel with a rule that bars recovery when no constitutional tort has occurred, or with the precept that municipalities and supervisors are not liable in civil rights cases for the acts of their employees under the doctrine of *respondeat superior*. What has emerged from *Heller*, however, in many circuits (including the Fourth Circuit in this case), is the notion (to coin a phrase) of "*non respondeat*

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9. *Accord Brodnicki v. City of Omaha*, 75 F.3d 1261, 1266 (8th Cir.), *cert. denied*, __ U.S. ___, 117 S. Ct. 179 (1996) (policy and training claims "lack merit" when arresting officers did not violate plaintiff's rights). In *Praprotnik v. St. Louis*, 485 U.S. 112, 117-118 (1988), the Court noted, but did not pass upon, the Eighth Circuit's application of *Heller*, in a case with a verdict against a municipality where individual defendants were exonerated.

10. *Accord Hancock v. Dodson*, 958 F.2d 1367, 1376 (6th Cir. 1992) (where a police officer is vindicated, "the city cannot be held liable for failure to train its police officers").

inferior": that supervisors and municipalities have a complete defense from the vindication of their subordinates, regardless of their own separate conduct.

Subjective intent defenses under *Farmer v. Brennan* and qualified immunity should not allow *Heller* to be applied as broadly as it was in this case. Simply put, the vindication of the deputies says nothing about the culpability of the sheriff and the county who failed to adopt policies or to train the deputies. When the individual officer who allegedly committed the constitutional violation is exonerated because of the lack of the requisite mental state, the municipality and supervisors may still be liable based on their own deliberately indifferent failure to train under *Farmer*. *See Fulkerson v. Lancaster*, 801 F. Supp. 1476 (E.D. Pa. 1992); *see also Parrish v. Luckie*, 963 F.2d 201, 206-07 (8th Cir. 1992) ("A public entity or supervisory official may be liable under § 1983, even though no government [officials] were personally liable.") The possible liability of supervisors and municipalities is even clearer when their subordinates' exoneration is based on qualified immunity. *See Owen v. City of Independence*, 445 U.S. 622, 651 (1980): in light of "qualified immunity enjoyed by most government officials, many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good-faith defense."[11]

Some Courts of Appeals have declined to apply *Heller* to insulate supervisors and municipalities when line officers are absolved on qualified immunity. *See Leatherman v. Tarrant County Narcotics-Intelligence*, 28 F.3d 1388, 1398 n.15 (5th Cir. 1994); *Prue v. City of Syracuse*, 26 F.3d 14 (2d Cir. 1994); *Hopkins v. Andaya*, 958 F.2d 881, 888 (9th Cir. 1992), *cert. denied*, 115 S. Ct. 1097 (1995); *Barber v. City of Salem*, 953 F.2d 232 (6th Cir. 1992). By contrast,

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11. *Accord County of Sacramento v. Lewis*, __ U.S. __, 118 S. Ct. 1708, 1714 n.5 (1998).

others have invoked *Heller* to preclude liability despite qualified immunity for subordinates. *See Joyce v. Town of Tewksbury*, 112 F.3d 19, 23 (1st Cir. 1997) (*en banc*); *Hinton v. City of Elwood*, 997 F.2d 774, 782 (10th Cir. 1993). Charting its own course, the Fourth Circuit here found that the jury instruction on the qualified immunity issue to be irrelevant, "harmless," error.

The myriad interpretations of *Heller* cry out for Supreme Court clarification. A plaintiff's basic federal civil rights should not turn on an accident of geography — nor, as here, on a fraudulently-obtained bifurcated trial, where the sheriff and the county were conspicuously absent.

This case presents in stark relief the realization of Justice Stevens' concern in his dissent in *Heller* that the Court was giving civil rights defendants a "tactical weapon of great value" if they can "bifurcate" supervisory and municipal liability from that of individual employees. 475 U.S. at 807. Although it is a profound injustice to deny petitioner all of her federal claims, the Fourth Circuit's ruling is of far greater moment for national civil rights jurisprudence than the individual fate of Kevin Brown. It deserves the attention of this Court.

II.

THE COURT SHOULD RESOLVE THE ISSUE OF WHETHER JURIES SHOULD BE INSTRUCTED ON QUALIFIED IMMUNITY IN CIVIL RIGHTS CASES (AND, IF SO, HOW).

A question of qualified immunity should "ordinarily be decided by the court long before trial." *Hunter v. Bryant*, 502 U.S. 224, 228 (1991). Accordingly, most Courts of Appeals have ruled that qualified immunity is not a jury question. *Tatro v. Kervin*, 41 F.3d 9,15 (1st Cir. 1994) ("[q]ualified immunity . . . should not be decided by the

jury"); *Cameron v. Seitz*, 38 F.3d 264, 273 n.2 (6th Cir. 1994) (qualified immunity should be decided by the judge); *Henderson v. DeRobertis*, 940 F.2d 1055, 1058 (7th Cir. 1991) (qualified immunity is question of law for the district court); *Chapman v. Nichols*, 989 F.2d 393, 398 (10th Cir. 1993) (jury should not decide whether an officer "could have reasonably believed he was acting properly in light of established law"); *Ansley v. Heinrich*, 925 F.2d 1339, 1348 (11th Cir. 1991) (jury should determine factual issues without any mention of qualified immunity); *Warren v. Dwyer*, 906 F.2d 70, 75 (2d Cir. 1990) (ultimate legal determination is "better left for the court to decide"). The Seventh Circuit posed the dilemma of charging a lay jury on this issue succinctly in *Alvarado v. Picur*, 859 F.2d 448, 451 (7th Cir. 1988):

> How was the jury supposed to determine the law on the dates in question? And, if the jury could somehow determine the law on the dates in question, how was it supposed to determine if that law was "clearly established"?

The Fifth Circuit, however, continues to disagree. *Snyder v. Trepagnier*, 142 F.3d 791, 799-800 (5th Cir. 1998) (district court did not err in submitting question of police officer's qualified immunity to jury); *accord Presley v. City of Benbrook*, 4 F.3d 405, 410 (5th Cir. 1993). As stated above, this Circuit split was not resolved last term because *Snyder* was settled after issuance of a writ of *certiorari*.

The Fourth Circuit here, while conceding that petitioner's claimed error on the qualified immunity instruction was "not without support," avoided the issue by finding it to be harmless error because the jury found no deliberate indifference and therefore never reached the "subsequent question" of qualified immunity. Appendix at 15a.

The problem is that Mr. Brown's jury was never instructed that qualified immunity was a "subsequent question."[12] Moreover, its general verdict form combined all issues into a single "yes/no" response. Appendix at 55a, *et seq*. Petitioner is aware of no other Court of Appeals decision that has found harmless error under these circumstances. Astonishingly, the decision on which the Fourth Circuit relied for harmless error — *Stone v. Peacock*, 968 F.2d 1163, 1166 (11th Cir. 1992) [Appendix at 13a] — actually holds to the contrary, *declining* to find harmless error:

> A general verdict was used and we cannot say whether the jury decided the case on the merits or whether, even if the jury found that defendants violated plaintiff's constitutional rights, the jury was persuaded that the defendants are entitled to qualified immunity . . . [so that the] qualified immunity instructions might have resulted in the defeat of an otherwise meritorious claim.

Even the Fifth Circuit, which allows jury resolution of qualified immunity claims, uses "special interrogatories" to separate the immunity defense from the merits. *Snyder v. Trepagnier*, 142 F.3d 791, 794 (5th Cir. 1998).

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12. The jury was told, in part:

> [A] defendant in the position of a deputy sheriff is entitled to qualified immunity only if he did not know what he did was in violation of federal law. . . . You must ask yourself what a reasonable official in defendant's situation would have believed about the legality of the defendant's conduct. You should not, however, consider . . . what the defendant's subjective intent was, even if you believe it was to harm the plaintiff.

This charge is reprinted in full in the Fourth Circuit's opinion, Appendix at 11a-12a.

Long ago, this Court held in a civil case that clear answers to "particular interrogatories" were necessary before a jury verdict could be sustained as uninfluenced by an "immaterial" (and therefore harmless) flawed instruction. *Kanawha & Michigan Railway Company v. Kerse*, 239 U.S. 576, 582 (1916). Indeed, in *Canton*, which established the *Monell* failure-to-train claim, and held that juries are presumed to act in accordance with their instructions, the Court remanded the case for a new trial because the jury's general verdict "did not state the basis on which it had ruled," leaving the possibility that it had erroneously found against the municipality on a *respondeat superior* theory. 489 U.S. at 383, 392.

> As a result, special interrogatories (except, apparently, in the Fourth Circuit) are now common in civil rights cases. *See Cottrell v. Caldwell*, 85 F.3d 1480, 1488 (11th Cir. 1996) (qualified immunity should not be submitted to the jury, just "special interrogatories" on the "who-what-when-where-why type of historical fact issues").

In *St. Hilaire v. Laconia*, 71 F.3d 20, 24 n.1 (1st Cir. 1995), the First Circuit observed that the question of the role of judge and jury as "fact finder" in qualified immunity cases "appears not to have been clearly decided by the Supreme Court," but it elected to use special interrogatories, reserving the ultimate question of law to the judge. *See also Karnes v. Skrutski*, 62 F.3d 485, 491 (3d Cir. 1995) (while the judge decides the ultimate qualified immunity question as a matter of law, the jury should decide disputed factual issues); *Warren v. Dwyer*, 906 F.2d 70 (2d Cir. 1990) (where unresolved factual issues prevent early disposition of qualified immunity defense, the jury should be given special interrogatories on disputed facts, with the ultimate legal determination, on facts found, whether a reasonable officer should have known he acted unlawfully, a question of law for the court); *Warlick v.*

Cross, 969 F.2d 303, 305 (7th Cir. 1992) (jury should be given "special interrogatories to allow it to determine disputed issues of fact upon which the court can base its legal determination of qualified immunity").

Even the use of jury interrogatories (which did *not* occur here) has divided the lower courts and has resulted in inconsistent decisions (even within Circuits). *Compare Karnes v. Skrutski*, 62 F.3d 485, 491 (3d Cir. 1995) (judge decides ultimate qualified immunity question as a matter of law) *with Sharrar* v. *Felsing*, 128 F.3d 810, 828 (3d Cir. 1997) (if there is a factual dispute, jury should decide objective reasonableness); *also compare Warren v. Dwyer*, 906 F.2d 70 (2d Cir. 1990) (jury should be given special interrogatories on unresolved factual issues regarding qualified immunity but ultimate legal determination is for the court) *with Oliveira v. Mayer*, 23 F.3d 642, 649-50 (2d Cir. 1994) (where there are factual disputes concerning encounter between policy and plaintiff, jury should resolve them and then proceed to determine "whether it was objectively reasonable for the defendants to believe that they were acting within the bounds of the law").

The Ninth Circuit has observed that it is an open question whether an immunity defense should be decided by judge or jury — *Acosta v. San Francisco*, 83 F.3d 1143, 1147 (9th Cir. 1996) — but it has noted its concerns: "sending the factual issues to the jury but reserving to the judge the ultimate 'reasonable officer' determination leads to serious logistical difficulties . . . and might be unworkable." *Sloman v. Tadlock*, 21 F.3d 1462, 1468 (9th Cir. 1994).

Indeed, one District Court in the Circuit where this case arose wrote (diplomatically) that the law in the Fourth Circuit is "not entirely clear." It pleaded for the issue to be put to rest "if the law governing appellate jurisdiction allows such good works." *Thompson v. Farmer*, 945 F. Supp. 109, 114-16 (W.D.N.C. 1996).

Last term, the Court mandated that the issue of qualified immunity be considered separately and secondarily to a claim of constitutional violation. *Wilson v. Layne*, __ U.S. __, 99 WL 320817 (1999): the trial court "must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation." __ U.S. __, 99 WL at 320817 n.4.[13]

This did not happen here, nor has the procedure here been allowed by any other Court of Appeals to petitioner's knowledge. The Fourth Circuit's finding of harmless error in the "lumping together" (and non-seriatim treatment) of all the liability issues and defenses is, until now, without sanctioned precedent in civil rights jurisprudence.[14]

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13. *See also Conn v. Brabbert*, 526 U.S. __, 119 S. Ct. 1292, 1294 (1999) (court must "first determine" constitutional claim); *County of Sacramento v. Lewis*, 523 U.S. 833, 840-42 (1998) (deciding constitutional question first promotes legal clarity); *Siegert v. Gilley*, 500 U.S. 226, 232 (1991) (policy reasons for separation of claims).

14. Similarly, the Fourth Circuit's reliance on the deputies' exoneration on state tort claims as support for its harmless error holding, is, with respect, hardly well-grounded. The jury could have found for the deputies on the state claim (as they did on the federal claim) because, due to their lack of training, they lacked the "utter disregard of caution" and "complete neglect" *mens rea* required under state law to establish gross negligence. *See Harris v. Harman*, 486 S.E.2d 99 (Va. 1997); *Chapman v. City of Virginia Beach*, 475 S.E.2d 798 (Va. 1996). Nothing in Virginia tort law allows individual employee defendants to parlay their own ignorance from lack of job training into a defense for the negligence of their supervisor-employers.

CONCLUSION

The admission of substance-impaired detainees like Kevin Brown into America's county jails and urban lock-ups is a daily fact of life in today's criminal justice system. That they require appropriate processing, including medical screening and attention, is beyond cavil. What happened to Mr. Brown should *never* have occurred and would *not* have occurred if Loudoun County had proper policies and its deputies had been adequately trained.

To permit the sheriff and the county in this case to escape supervisory liability because the deputies they knowingly failed to train did not know any better is not just a tragedy for Mr. Brown. It harkens a diminution of civil rights for countless others in the future.

All Mrs. Hoy seeks is her day in Court on behalf of her son, on a level playing field, where all defendants potentially responsible must account for themselves. For these and the foregoing reasons, a writ of *certiorari* should issue.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED AND DECIDED JUNE 25, 1999

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 97-1583

CATHERINE L. HOY, Guardian for Kevin A. Brown,

Plaintiff-Appellant,

v.

STEVE A. SIMPSON, Sheriff of Loudoun County; DANIEL DONDERO; TRULA PEACH; LANCE SCHUL; JAMES DRUMMOND; SHANNON M. DALY; THE LOUDOUN COUNTY BOARD OF SUPERVISORS; MICHAEL COX; JACK BRADLEY; JEFFREY FRAGALA; UNKNOWN SHERIFF'S DEPUTIES,

Defendants-Appellees.

No. 98-2605

CATHERINE L. HOY, Guardian for Kevin A. Brown,

Plaintiff-Appellant,

v.

STEVE A. SIMPSON, Sheriff of Loudoun County; DANIEL DONDERO; TRULA PEACH; LANCE SCHUL; JAMES

Appendix A

DRUMMOND; SHANNON M. DALY; THE LOUDOUN COUNTY BOARD OF SUPERVISORS; MICHAEL COX; JACK BRADLEY; JEFFREY FRAGALA; UNKNOWN SHERIFF'S DEPUTIES,

Defendants-Appellees.

Appeals from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Leonie M. Brinkema, District Judge.
(CA-96-726-A)

Argued: April 9, 1999

Decided: June 25, 1999

Before LUTTIG and WILLIAMS, Circuit Judges, and BUTZNER, Senior Circuit Judge.

* * *

OPINION

PER CURIAM:

Catherine L. Hoy brought this federal civil rights action, with pendent state law tort claims, against Loudoun County, the Sheriff of Loudoun County, and seven sheriff's deputies after her son Kevin Brown suffered injuries while being detained at the Loudoun County jail that left him in a persistent vegetative state. Hoy appeals the district court's dismissal of her claims against the County and the Sheriff, and its entry

of judgment, after a jury trial, in favor of the sheriff's deputies.

I.

On the evening of Friday, March 22, 1996, thirty-three year old Kevin Brown was arrested by police from the Town of Leesburg and jailed at the Loudoun County Adult Detention Center ("Loudoun County ADC" or "ADC") on a charge of public drunkenness. Brown was well-known to officials at the ADC, having been held fourteen times before on such charges. Brown was scheduled to be released at 8:00 a.m the next morning, but his release was delayed until the afternoon as a result of his continued intoxication.

At approximately 6:30 a.m. on Sunday, March 24, the morning after his release, Brown entered a 7-11 convenience store in Leesburg. Brown was obviously intoxicated — he was loud and verbally abusive and was having trouble maintaining his balance. While in the store, he began to vomit. A Leesburg police officer arrived on the scene and again took Brown into custody on charges of public drunkenness. The officer transported Brown to the Loudoun County ADC, where a magistrate signed a commitment card and ordered that Brown be released by 6:00 p.m. that evening, provided he was sober.

Brown was booked at 8:00 a.m. and placed in a holding cell, where he remained for the next twenty-two hours. Brown's exact condition at the time of his booking and throughout this period was a matter of some dispute at trial, but there is no doubt that he was highly intoxicated and spent most, if

not all, of that time either asleep or unconscious. Sheriff's deputies at the ADC checked on Brown regularly throughout the day and night of March 24 and the early morning of March 25, and tried a number of times, unsuccessfully, to awaken him.

At approximately 5:25 a.m. on March 25, near the end of his shift, sheriff's deputy Bradley, who had failed in two attempts to rouse Brown during the night, stopped by to check on him. Bradley testified at trial that at this time he noticed that Brown was having difficulty breathing, which was a change from his condition as Bradley had observed it during the night. Bradley took immediate steps to aid Brown and summon medical assistance. Shift commander Sergeant Shannon Daly responded from less than ten yards away, and the two men observed Brown vomiting or spitting what appeared to be clear fluid, including some blood and mucus. Daly summoned a rescue squad, which responded at approximately 5:35 a.m. The rescue squad gave Brown oxygen and placed him on an EKG monitor, and administered an anti-narcotic drug and another drug to raise his blood sugar. Brown was transported to Loudoun Hospital Center at 5:52 a.m., and arrived at 5:55 a.m. Over the next few hours and days, Brown experienced significant seizure activity and cerebral swelling, and was ultimately diagnosed as having slipped into a persistent vegetative state.

Catherine Hoy, Brown's mother and guardian, brought this action in the United States District Court for the Eastern District of Virginia against Loudoun County, by its Board of Supervisors, Loudoun County Sheriff Steve Simpson, and seven sheriff's deputies, seeking damages and injunctive

relief under 42 U.S.C. § 1983, on the grounds that Brown's due process rights had been violated, and damages under state law for both simple and gross negligence. The district court denied defendants' motion to dismiss and permitted the parties to proceed with extensive discovery. On cross-motions for summary judgment at the close of discovery, the district court granted summary judgment to the defendants on Counts III and IV (of seven) of the complaint alleging the liability of the County and the Sheriff for failure properly to train the deputies and to adopt procedures for the care of intoxicated detainees, and for the failure to provide an adequate facility. Sheriff Simpson remained a party to the action under a *respondeat superior* theory on the state law negligence and gross negligence counts (Counts VI and VII). Hoy's cross-motion for summary judgment was denied, and she voluntarily dismissed Count V of her complaint alleging the deputies' use of excessive force.

The case went to trial before a jury on the remaining four counts alleging denial of medical treatment, deliberate indifference to medical needs, negligence, and gross negligence. The trial lasted five days, during which the jury heard testimony from dozens of witnesses. At the close of Hoy's case, the Sheriff and his deputies moved for judgment as matter of law pursuant to Fed. R. Civ. P. 50. Pursuant to that motion, the district court dismissed Count VII, the simple negligence claim, because under Virginia law the County's sovereign immunity from suit extended to the Sheriff and his deputies for negligent performance of their discretionary governmental functions. Following the presentation of their case, the defendants renewed their Rule 50 motion, which the district court denied in full. Three counts were thus

submitted to the jury: Counts I and II of the section 1983 action, alleging "Denial of Medical Treatment" and "Deliberate Indifference to Medical Needs," respectively, and Count VI, the state law gross negligence claim. After deliberating for less than three hours, the jury returned a unanimous verdict in favor of the defendants on all three counts. The court then denied plaintiff's motion for a new trial.

While plaintiff's appeal of the jury verdict and the summary judgment was pending, she filed a motion with this court under Fed. R. Civ. P. 60(b) to amend the record and present argument related to "newly discovered evidence." We held the appeal in abeyance and remanded the case to the district court for a determination on the merits of that motion, in which Hoy alleged that defendants had withheld certain information pertaining to the Sheriff's compliance with Virginia Department of Corrections Standards in operating the ADC, and to the involvement of the Loudoun County Board of Supervisors in supervising the facility. Plaintiff argued that this evidence warranted vacating the district court's award of summary judgment to the Sheriff and the County on Count III of the First Amended Complaint alleging a failure by the Sheriff to train deputies and adopt proper policies for monitoring intoxicated detainees. The district court agreed, ruling that evidence of the Sheriff's failure to comply with Department of Corrections standards, of notice of deficiencies in training or procedures, and of policymaking activity by the Board of Supervisors, could have created genuine issues of material fact that would have made the grant of summary judgment improper. The court vacated its summary judgment order and re-opened discovery for a

period of forty-five days on the limited issues identified by Hoy in her motion.

After taking sixteen depositions and filing a number of additional discovery motions, Hoy filed a Second Amended Complaint alleging in four new counts that Sheriff Simpson and the Loudoun County Board of Supervisors were deliberately indifferent specifically by failing to train deputies to perform a proper medical screening and to insure that the deputies' first-aid re-certifications were up to date, and by allowing newly appointed deputies to be assigned for work in the ADC. The complaint also included two new counts alleging liability for simple and gross negligence as a result of these training and supervisory deficiencies. Defendants moved to dismiss the Second Amended Complaint under Fed. R. Civ. P. 12(b)(6), and the district court granted the motion on the stated ground that plaintiff had failed to plead sufficient facts to establish a claim of deliberate indifference. Plaintiff now appeals the dismissal of her Second Amended Complaint as well as the earlier judgment entered on the jury verdict.

II.

We consider first appellant's challenges to the judgment entered on the jury verdict in favor of the defendant sheriff's deputies. Appellant argues that the court erred by failing specifically to instruct the jurors that the state-of-mind required to support a finding of deliberate indifference could be established by circumstantial evidence and by giving a qualified immunity instruction that "hopelessly confused" them. Appellant also contends that she was prejudiced by

the district court's failure to comply with the requirement of Fed. R. Civ. P. 51 that it advise the parties before closing argument of its proposed action on their requested instructions. Finding no reversible error, we affirm the jury verdict in favor of the sheriff's deputies.

A.

Appellant claims first that she is entitled to a new trial because the district court's instructions on "deliberate indifference" were inadequate in light of the Supreme Court's decision in *Farmer* v. *Brennan*, 511 U.S. 825 (1994), defining that term for the purposes of establishing a constitutional violation.[1] In *Farmer*, the Supreme Court sought to clarify the deliberate indifference standard it had announced nearly twenty years earlier in *Estelle* v. *Gamble*, 429 U.S. 97 (1976). Explicitly rejecting the "invitation to adopt an objective test for deliberate indifference" along the lines of "civil-law recklessness," the Court adopted instead a subjective standard focusing on the defendant's *conscious* disregard of a substantial risk of harm. *Farmer*, 511 U.S. at 836-37. Thus,

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1. Although *Farmer* v. *Brennan* considered the "deliberate indifference" standard in the context of a prisoner's claim of a violation of the Eighth Amendment's prohibition against cruel and unusual punishment, this court has previously held that the same standard applies to due process claims brought by pre-trial detainees like Brown. *Gordon* v. *Kidd*, 971 F.2d 1087, 1094 (4th Cir. 1992). In any event, plaintiff has not challenged the applicability of the deliberate indifference standard to either of the section 1983 counts of her complaint, in the district court or on appeal. Rather, she contends only that the district court did not properly instruct the jury as to the application of that standard.

the Court held that "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* at 838.

Appellant does not argue that the district court erred in instructing the jury on this actual knowledge requirement. Rather, she contends that the court erred by neglecting to explain to the jury, consistent with the Court's admonition in *Farmer*, that the question whether the official had the requisite knowledge "is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that a risk was obvious." *Id.* at 842 (internal quotations and citation omitted).

We find that the district court did not abuse its discretion in denying appellant's requested jury instructions on deliberate indifference, because the court's instructions "adequately informed the jury of the controlling legal principles without misleading or confusing the jury to the prejudice of the [appellant]." *Spell* v. *McDaniel*, 824 F.2d 1380, 1395 (4th Cir. 1987). First, although the district court did not give the specific instruction that appellant requested, it did give a standard general instruction on the value of circumstantial evidence in establishing any contested fact. J.A. at 2828-29.

Second, with respect to the specific deliberate indifference charge given, the district court began by essentially quoting to the jury the *Farmer* standard:

> [T]he plaintiff has the burden of showing that the defendant . . . had both been aware of facts from which the inference could be drawn that a substantial risk of serious harm existed and that the individual deputy sheriff also must have drawn such an inference.

J.A. at 2841. The district court did not stop there, however. It went on to explain that the jury

> would have to determine . . . from *all the facts and circumstances of the case* whether or not any one or all or a group of these deputies had that kind of subjective awareness of the known serious medical needs of Mr. Brown in order . . . to find that the deliberate indifference standard has been met.

J.A. at 2842 (emphasis added). Finally, the court went so far as to instruct that

> deliberate indifference may be demonstrated by either actual intent or reckless disregard. A person acts recklessly by disregarding a substantial risk of danger that is either known to the person or which would be *apparent to a reasonable person in that position.*

J.A. at 2842 (emphasis added). Thus, the district court made clear that the jury in determining a defendant's state-of-mind should consider all of the facts and circumstances, including the obviousness of the risk. Accordingly, we are satisfied

that the district court's instruction adequately informed the jury of the essential principles of the deliberate indifference standard.

B.

Next, appellant argues that the district court erred by giving the following qualified immunity instruction, which was a variation of one defendants had requested:

> Now a defendant in the position of a deputy sheriff is entitled to a qualified immunity only if he did not know what he did was in violation of federal law and if a competent public official would not have been expected at the time to know that the conduct was in violation of federal law. In deciding what a competent official would have known about the legality of the defendant's conduct, you may consider the nature of the defendant's official duties, the character of his official position, the information which was known to the defendant or not known to him, and the events which confronted him.
>
> You must ask yourself what a reasonable official in defendant's situation would have believed about the legality of the defendant's conduct. *You should not, however, consider that, what the defendant's subjective intent was, even if you believe it was to harm the plaintiff.* You may also use your common sense. If you find that a reasonable official in defendant's situation would

> believe his conduct to be lawful, then this element will be satisfied.

J.A. at 2846-47 (emphases added).

Appellant argues that this instruction constituted reversible error because its prohibition of any inquiry into subjective intent was "hopelessly confusing" when considered in conjunction with the deliberate indifference charge requiring the jurors to consider each defendant's state-of-mind. In addition, appellant contends, the question whether a defendant is entitled to qualified immunity is always a question of law and thus should never be submitted to the jury. *See, e.g., Warlick* v. *Cross*, 969 F.2d 303, 305 (7th Cir. 1992).

Although we find nothing inherently confusing about two separate instructions that accurately convey that an alleged constitutional violation requires an inquiry into the defendant's subjective awareness while a defense to liability for that violation does not, appellant's related contention — that qualified immunity should never be left to the jury — is less easily dismissed. For the instructions given in this case would seem to allow the jury to find that an individual defendant was in fact deliberately indifferent to Brown's serious medical needs, *but* that he was immune from liability because a reasonable officer would not know that such indifference constituted a violation of federal law. Appellant's argument, and it is not without support, is that this latter conclusion would rest on a determination that it was not "clearly established," in the particularized sense that our caselaw requires, *see DiMeglio* v. *Haines*, 45 F.3d 790,

804 (4th Cir. 1995), that deliberate indifference to an intoxicated pre-trial detainee's medical need would violate that detainee's constitutional rights to due process. This determination, appellant contends, is for the court to make. *See, e.g., Warren* v. *Dwyer*, 906 F.2d 70, 75 (2nd Cir. 1990) ("The ultimate legal determination whether, on the facts found, a reasonable police officer should have known he acted unlawfully is a question of law better left for the court to decide.").

We need not decide whether allowing the jury to make this determination was error, however, because the jury's clear verdict that the defendants were *not* deliberately indifferent precluded any consideration of the qualified immunity question, and thus any error in giving the instruction was harmless. *See Stone* v. *Peacock*, 968 F.2d 1163, 1166 (11th Cir. 1992) ("Even if a court improperly instructs the jury on qualified immunity, however, the error does not require reversal if it can be determined that the jury decided the case on the merits and not on qualified immunity.").

The district court, in consultation with the parties, prepared verdict forms that expressly and unambiguously asked the jurors to state their finding whether each defendant had violated Kevin Brown's constitutional rights. Thus, the jury received individual verdict forms for each defendant that read as follows:

> We, the Jury, unanimously find that the plaintiff, Catherine L. Hoy, guardian for Kevin A. Brown, has proven by a preponderance of the evidence that [the defendant] violated the civil rights of

> Kevin Brown by denying him medical treatment for a known serious medical need.
>
> We, the Jury, unanimously find that the plaintiff, Catherine L. Hoy, guardian for Kevin A. Brown, has proven by a preponderance of the evidence that [the defendant] violated the civil rights of Kevin Brown by being deliberately indifferent to a known serious medical need.
>
> We, the Jury, unanimously find that the plaintiff, Catherine L. Hoy, guardian for Kevin A. Brown, has proven by a preponderance of the evidence that [the defendant] was grossly negligent in her handling of Kevin Brown.

The jury answered each question with respect to each defendant by checking the box marked "No." Further, after the verdicts were read, the jury was polled at plaintiff's counsel's request, and each juror without hesitation confirmed that these were his verdicts as to each individual defendant. These verdicts clearly demonstrate that the jurors were persuaded by the defense the sheriff's deputies put on — a defense which emphasized *not* the deputies' assertion of qualified immunity from suit (which as best we can tell was never mentioned by either party), but rather, as the district court noted at a post-trial hearing, "the deliberate indifference concept . . . and an argument about whether or not the catastrophic injuries to Mr. Hoy were, in fact, a result of all of this long sleep or a result of the status epilectus related to the significant alcohol history that he had." J.A. at

2879.[2] Because the jury concluded that there was no deliberate indifference, and thus had no cause to consider the subsequent question of whether the defendants were entitled to qualified immunity, the district court's instruction on that defense, even if given in error, was harmless. *Cf. Harwood* v. *Partredereit AF 15.5.81*, 944 F.2d 1187, 1192-3 (4th Cir. 1991) ("When a jury is instructed on two theories of liability, one which is proper and the other which is not, the court must remand the case for a new trial unless it is reasonably certain that the jury's verdict was not influenced by the erroneously-submitted . . . theor[y]." (citation and internal quotations omitted) (alteration in original)).

If any confirmation were needed of the jury's determination that defendants were not deliberately indifferent to Brown's serious medical needs, it can be found in the jury's equally unequivocal resolution of the state law gross negligence claim, as to which no immunity defense was either applicable or given. In sending the gross negligence claim to the jury, the court gave the following instruction:

> [N]egligence is the failure to use ordinary care. Ordinary care is care a reasonable person would have used under the circumstances of this case.

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2. In returning in less than three hours with unanimous verdicts indicating its wholesale acceptance of this defense, the jury demonstrated a view of the evidence presented at trial that was obviously shared by Judge Brinkema, who told counsel that plaintiff had presented "a weak case," and that the court had given plaintiff the"benefit of the doubt" by not granting defendant's motion for judgment as a matter of law at the end of plaintiff's case. J.A. at 2871.

> Gross negligence is a higher degree of negligence, and you must remember that throughout your deliberations. Gross negligence is that degree of negligence which shows such *indifference* to others as constitutes an utter disregard of caution, amounting to a complete neglect of the safety of another person. It is such negligence as would shock fair-minded people, although it is *something less than willful recklessness.*

J.A. at 2848 (emphases added). In contrast, in charging the jury on deliberate indifference, the district court set a higher standard for liability, emphasizing that the section 1983 claims required either a showing that the individual defendants acted with *subjective awareness* of a serious medical need, defined as one that "is so obvious that a layperson would easily recognize the necessity for a doctor's attention," J.A. at 2842, or with willful recklessness:

> Mere negligence is not enough . . . . Another way of thinking about deliberate indifference to a serious medical need is when the treatment is so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental unfairness. Deliberate indifference may be demonstrated by either actual intent or reckless disregard . . . . An act is reckless if done in *conscious* disregard of its known probable consequences.

J.A. 2842-44 (emphasis added).

This latter instruction tracked *Farmer*, in which the Supreme Court emphasized that liability under a section 1983 deliberate indifference claim required at the very least a finding of exactly this type of *willful* recklessness, akin to the concept of recklessness commonly applied in the criminal law context. *Farmer*, 511 U.S. at 837. In doing so, the Court explicitly declined to adopt as the Eighth Amendment standard the model of "civil-law recklessness" reflected in the district court's "gross negligence" instruction. *See id.*[3]

Thus, the jurors, in rejecting appellant's state law claim of gross negligence, found that she had not demonstrated even the civil law recklessness that the Supreme Court held in *Farmer* was *insufficient* to support a constitutional claim of deliberate indifference. It is no surprise, then, that the jury also found that the defendants were not *deliberately* indifferent to Brown's serious medical needs under a standard that required a finding not only of a substantial risk of serious harm, but also that the defendants had actual knowledge of that risk and consciously disregarded it.[4]

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3. Indeed, the Supreme Court noted that the very term "gross negligence" was generally synonymous with the civil law recklessness that the Court held could not support a finding of a constitutional deprivation. *Farmer*, 511 at 836 n.4.

4. Alternatively, the jury may have found that the defendants *were* grossly negligent, but that their gross negligence was not a proximate cause of Mr. Brown's injuries. J.A. at 2847. Indeed, defense counsel argued persuasively in his closing arguments that "Kevin Brown's medical emergency had nothing to do with his handling at the jail," J.A. at 2790, and that the plaintiff had not

(Cont'd)

Accordingly, we are satisfied that the jury's verdicts rested, as their verdict forms unambiguously state, on a finding that no constitutional violation had occurred, and that any error in giving the qualified immunity instruction was therefore harmless.

C.

Finally, appellant argues that she is entitled to a new trial because the district court failed to comply with the requirement of Fed. R. Civ. P. 51 that it inform the parties before closing arguments of its proposed actions on their requested instructions.[5] According to appellant, her counsel

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(Cont'd)
proven that "Brown would be any better off today if the deputies had acted differently." J.A. at 2791. A jury finding that the plaintiff had failed to establish proximate cause for purposes of the gross negligence claim would necessarily serve to defeat plaintiff's constitutional claims as well. *See* J.A. at 2844 (jury instructions) ("Now the third element in a civil rights action is proximate cause. And by the way, proximate cause also runs through the state cause of action for gross negligence, so this will help you on both of those.").

5. Rule 51 provides as follows:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury . . . . No party may assign

(Cont'd)

was "blind-sided" by the court's instructions, and thus unable properly to object to the court's assertedly erroneous deliberate indifference and qualified immunity charges. Although we agree with appellant that the district court erred in failing to inform the parties with some degree of specificity before closing argument which instructions it intended to give, we again do not believe that appellant has demonstrated prejudice entitling her to a new trial.

The district court informed counsel, several days before closing arguments, of its intention

> to rely on Devitt and Blackmar on the standard jury instruction in terms of the civil rights statute. I'm going to use my standard instructions, which are a humanized version of Devitt and Blackmar.

J.A. at 2651. While appellees may be correct that Rule 51 does not require the court to provide counsel with the exact words it intends to use in instructing the jury, *see, e.g.*, *Dunn* v. *St. Louis-San Francisco Ry. Co.*, 370 F.2d 681, 683 (10th Cir. 1967) ("The court may inform counsel in general terms suitable to this purpose, and need not . . . do so in a sentence-by-sentence outline."), it is also undoubtedly true that the rule *does* require, at the very least, that the court make clear in advance *which* instructions in substance it intends to give. *See, e.g.*, *Jones* v. *Southern Pacific R.R.*, 962 F.2d 447, 451

(Cont'd)

> as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.

(1st Cir. 1992) ("It is enough that counsel be apprised of the *substance* of the instructions." (emphasis added)). To hold otherwise would undermine the manifest purpose of the provision, which courts have identified as "promot[ing] intelligent advocacy by opposing counsel," and allowing counsel to "pattern their closing arguments on the points of law that will be explained to the jury in the final charge." *Estate of Stuart Lutren* v. *Chesapeake and Ohio Railroad*, 592 F.2d 941, 945 (6th Cir. 1979); *see Wiedersum Assocs.* v. *National Homes Constr. Corp.*, 540 F.2d 62, 66 (2nd Cir. 1976). Where, as here, the defendants have requested a qualified immunity instruction, a vague statement that the court intends to "rely on Devitt and Blackmar on the standard jury instruction in terms of the civil rights statute" cannot adequately serve this purpose, as the statement gives no indication at all whether the court intends to give some variant of that particular requested instruction (which, according to the treatise to which the court referred, is to be given in "relatively rare and limited" circumstances).

Nonetheless, "noncompliance with [Rule 51] does not warrant a new trial unless material prejudice is shown to exist." *Hardigg* v. *Inglett*, 250 F.2d 895, 897 (4th Cir. 1957). Given the provision's purpose, material prejudice from the court's failure to comply with Rule 51's notice requirement is generally established by a showing that the error "hinder[ed] [counsel] in their ability to present summations which fully dealt with the issues to be placed before the jury." *Wiedersum Assocs.*, 540 F.2d at 66. However, appellant does not argue before this court that her counsel's closing argument was adversely affected by the court's failure to comply with the rule. Rather, she contends only that counsel

was prejudiced in his ability properly to object to the instructions that were actually given. Because we have determined, *see infra*, that any error in the instructions was harmless, we must also conclude, *a fortiori*, that appellant was not materially prejudiced by her counsel's asserted inability properly to object to those instructions.[6] Accordingly, because appellant has not even suggested that her counsel's summation suffered as a result of the court's non-compliance with Rule 51 and because the instructions in question did not themselves constitute reversible error, we do not find the material prejudice that would entitle appellant to a new trial.[7]

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6. In light of the district court's deviation from the terms of the rule, we have, in an abundance of caution, reviewed appellant's specific claims of instructional error despite her counsel's arguable failure to preserve these exceptions with the degree of specificity the rule also requires. *See, e.g., Jerlyn Yacht Sales, Inc.*, 950 F.2d 60, 66 (1st Cir. 1991) ("[S]imply referring by number to a request filed prior to the charge is not sufficient to preserve an objection to the court's failure to give the requested instruction."). We have done so out of recognition that an additional consequence of the court's refusal to advise the parties in advance of its proposed action on their requested instructions was to leave plaintiff's counsel scrambling at the last moment to determine which of the parties' instructions the court actually gave, and in what form, so that counsel could properly frame and preserve her objections before the jury retired.

7. We note that the district court, in defending its "practice" of refusing to advise counsel any more specifically of its intentions with respect to requested instructions, commented that this practice had "not yet been addressed or criticized by the Court of Appeals."

(Cont'd)

For these reasons, we affirm the judgment that the sheriff's deputies did not violate Brown's constitutional rights.

III.

Hoy also appeals the district court's dismissal of the federal civil rights claims in her Second Amended Complaint alleging that the Sheriff and the County violated Brown's constitutional rights by failing properly to train the deputies or to provide adequate procedures for the screening and care of intoxicated detainees. The district court dismissed the complaint on the specific ground that plaintiff had not "adequately ple[d] sufficient facts to sustain a case involving deliberate indifference to the degree that a constitutional violation occurred," and that "principles of qualified immunity as well as the concepts of sovereign immunity" dictated this result. We affirm the dismissal of the federal civil rights claims, but do so on different grounds than those relied upon, or alluded to, by the district court. Rather, we affirm the dismissal of these claims because the jury's finding that the sheriff's deputies inflicted no constitutional injury on Brown removed any basis for liability of the County or the Sheriff under section 1983.

(Cont'd)

J.A. at 2899. The fact that we find no *reversible* error in *this* case should not be confused with an absence of "criticism" of a practice that we believe falls considerably short of the mandatory requirements of the Federal Rules of Civil Procedure and which, in some future case, will inevitably result in exactly the material prejudice to one or another party that the rule was designed to prevent.

Municipal governments cannot be held liable under section 1983 on the basis of *respondeat superior*. *See Monell* v. *New York City Dep't of Social Servs.*, 436 U.S. 658, 694 (1978). Rather, in order to establish municipal liability, a plaintiff must show the existence of a "direct causal link between a municipal policy or custom and the alleged constitutional deprivation." *Canton* v. *City of Harris*, 489 U.S. 378, 384 (1989). Where the claim against the municipality is that its failure, or the failure of its policymakers, to provide proper training resulted in the alleged constitutional deprivation, liability will lie only where the "city's failure to train reflects deliberate indifference to the constitutional rights of its inhabitants." *Id.* at 392.

The district court, in granting the motion to dismiss, focused only on the question whether appellant had sufficiently pled this necessary causal link. That is, the district court dismissed the claims after concluding that appellant had not alleged facts that could establish that the county's failure to train the sheriff's deputies reflected "deliberate indifference" to the constitutional rights of its inhabitants. *Id.* at 392. While we are dubious that such a determination could legitimately be made as a matter of law from the four corners of the complaint, we nonetheless affirm the judgment of dismissal. In light of the jury verdict, herein affirmed, that none of the individual sheriff's deputies was deliberately indifferent to Brown's serious medical needs, and thus that he suffered no constitutional deprivation, there simply is no basis for municipal liability even if appellant *could* establish that the county was deliberately indifferent under *Canton* v. *Harris*. *See City of Los Angeles* v. *Heller*, 475 U.S. 796, 799 (1986) (*per curiam*) ("[N]either *Monell* v. *New York City Dept. of*

Social Services . . . nor any other of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm."); *Giancola* v. *State of West Virginia Dept. of Pub. Safety*, 830 F.2d 547, 550 (4th Cir. 1987) ("If the officers' actions were in compliance with constitutional standards, there is no liability on the part of . . . the employing entities."); *Hinton* v. *City of Elwood, Kan.*, 997 F.2d 774, 782 (10th Cir. 1993) ("A municipality may not be held liable where there was no underlying constitutional violation by any of its officers."). Accordingly, we affirm dismissal of the section 1983 claims against Loudoun County and the Sheriff.

IV.

Finally, while we readily affirm the dismissal of the pendent state law negligence and gross negligence claims against the County on sovereign immunity grounds, *see Mann* v. *County Board*, 199 Va. 169 (1957), we cannot do so, at least without further explanation, with respect to those same claims brought against the Sheriff in his individual capacity. Neither the district court in its order from the bench nor appellees in their briefs on appeal has attempted to explain why these state law claims against the Sheriff should not survive the motion to dismiss under Virginia tort law. Accordingly, we vacate the dismissal of the pendent state law claims against Sheriff Simpson and remand for consideration of their proper disposition.

Appendix A

CONCLUSION

For the reasons stated herein, we affirm in part and vacate in part the judgment of the district court, and remand for further proceedings.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

APPENDIX B — MEMORANDUM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION DATED AND FILED JUNE 5, 1998

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civ. Action No. 96-726-A

CATHERINE L. HOY, Guardian for KEVIN A. BROWN,

Plaintiff,

v.

STEPHEN O. SIMPSON Sheriff of
Loudoun County, *et al.*,

Defendants.

MEMORANDUM ORDER

Before the Court are plaintiff's Motion for Relief Pursuant to Fed. R. Civ. P. 60(b) and for Supplementation of the Record; Supplemental Motion for Relief Pursuant to Fed. R. Civ. P. 60(b)(3) Relating to the Supervisory Capacity of the Loudoun County Board of Supervisors; and Motion Pursuant to Fed. R. Civ. P. 15(a), (c), and (d) to Amend or Supplement Catherine Hoy's Motion for Relief Pursuant to Fed. R. Civ. P. 60(b). By these motions, plaintiff asks the Court to vacate its rulings of February 13, 1997, and April 7, 1997, granting summary judgment in favor of the

defendants on Counts III and IV of the Complaint, and to re-open discovery as to those limited issues. The Court heard argument on these motions on May 15, 1998.

At the May 15, 1998, hearing, the Court advised the parties that it would consider the arguments asserted in plaintiff's supplemental motion. Plaintiff's Motion Pursuant to Fed. R. Civ. P. 15(a), (c), and (d) to Amend or Supplement Catherine Hoy's Motion for Relief Pursuant to Fed. R. Civ. P. 60(b) is therefore GRANTED in accordance with that ruling.

A. *Motion for Relief Pursuant to Fed. R. Civ. P. 60(b) and for Supplementation of the Record*

1. *Relief on the basis of newly discovered evidence*

In *Boryan v. United States*, 884 F.2d 767 (4th Cir. 1989), the Fourth Circuit set forth the factors that a district court should apply in determining whether to grant Rule 60(b)(2) relief on the basis of newly discovered evidence. Specifically, the court must determine whether (1) the evidence is newly discovered; (2) the movant exercised due diligence to discover the new evidence; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require amendment of the judgment. *See* 884 F.2d at 771.

We find that these factors have been met in this case. First, the evidence at issue was not discovered until plaintiff made its FOIA request in January of this year, well after the

judgment was entered. Second, although defendants argue that plaintiff knew or at least should have known that this evidence existed, it is undisputed that plaintiff sought precisely this type of information through her formal discovery requests. In response to those requests, defendants neither produced the information nor indicated that they knew where plaintiff could get the information. Defendants' argument therefore does not persuade the Court. As plaintiff correctly points out, a party is entitled to rely on the discovery obligations of opposing parties under Fed. R. Civ. P. 26(e)(2) that require supplementation of discovery "if the party learns that the response is in some material respect incomplete or incorrect." Even if plaintiff in fact knew that such a report existed, we find that the defendants also clearly knew of its existence yet failed to provide it to plaintiff during discovery. In addition, defendants' argument that the Report was not in any defendant's possession and that plaintiff had an obligation to specifically identify the documents it sought are completely unconvincing. The defendants were able to obtain the 1994 Report easily in response to the FOIA request, which demonstrates that they had the obligation, at the very least, to tell plaintiff's counsel that such a report could be obtained from the Department of Corrections in Richmond. Moreover, if plaintiff knew or should have known about the Report in light of her expert witness, certainly defendants — who had an obligation to correct the deficiencies identified in the Report — also knew about its existence.

Third, the evidence appears not to be merely cumulative because, with respect to the certification issue, the only evidence produced at trial was that the jail had been certified.

Appendix B

The Report appears to point out certain shortcomings that may have resurfaced while Brown was in the jail. Specifically, the lack of current first aid certification for all jail security staff was one ground for the previous probation status. Moreover, this evidence is more than merely impeaching because it tends to establish that the defendants had notice of deficiencies serious enough to prevent certification if left uncorrected. Thus, the fourth factor is also satisfied as the evidence clearly is material.

Finally, as plaintiff points out, evidence of a defect in policy, of the failure to comply with Department of Corrections standards, and of notice to the policy makers could create genuine issues of material fact that at least arguably would have made granting summary judgment inappropriate. Indeed, defendants' argument that the information is irrelevant in light of the jail being certified at the time in question does not convince the Court that discovery should not be re-opened in this case. Although the 1995 certificate creates a presumption that the jail was in compliance with all applicable standards, if plaintiff can discover evidence to support her argument that the jail was being operated in violation of proper policies and procedures, she may be able to rebut this presumption.

For these reasons, we find that the standard for granting relief under Fed. R. Civ. P. 60(b)(2) has been satisfied, and plaintiff's motion will be granted on this basis.

2. *Relief on the basis of fraud*

For the Court to grant Rule 60 relief on the basis of fraud, the moving party must establish: (1) that it has a meritorious

defense; (2) that there is clear and convincing evidence of misconduct; and (3) that the misconduct prevented the moving party from fully presenting its case. *See Schultz v. Butcher*, 24 F.3d 626, 630 (4th Cir. 1994). We note that the standard for granting relief under Rule 60(b)(2) is more stringent than under Rule 60(b)(3).

With respect to the first factor, it is significant that the Court granted defendants' summary judgment motion based in part on the fact that there was before the Court no evidence that the jail did not meet the minimum standards required by the Commonwealth. Evidence that the defendants had previous notice of deficiencies and thereafter allowed those deficiencies to continue as alleged by the plaintiff clearly would support a meritorious argument, even in the face of certification.

With respect to the second factor, this Court need only look to the *Schultz* decision in which the Fourth Circuit held that "an adverse party's failure, either inadvertent or intentional, to produce such obviously pertinent requested discovery material in its possession is misconduct under the meaning of Rule 60(b)(3)." *Schultz*, 21 F.3d at 630.

Finally, with respect to factor three, we already have indicated in our discussion above that any evidence relating to the deficiencies at the jail may have had an impact on the Court's summary judgment decision. Thus, the fact that "new evidence does not have to be result altering to warrant a new trial on a Rule 60(b)(3) motion," *id.* at 631, leaves the Court with no doubt that the misconduct here prevented the plaintiff from fully presenting her case.

Appendix B

B. *Supplemental Motion for Relief Pursuant to Fed. R. Civ. P. 60(b)(3) Relating to the Supervisory Capacity of the Loudoun County Board of Supervisors*

In deciding this motion, the Court applies the same standard set forth in section A.2 above.

With respect to the first factor, we find that the Court based its earlier ruling in part on the fact that there was no evidence in the record that the county exercised any supervisory or policy making authority with respect to the jail. Thus, we again find that the evidence to the contrary clearly would support a meritorious argument.

With respect to the second factor, it is not disputed that plaintiff requested in discovery "all documents of any nature whatsoever that would indicate a relationship between the county and the jail, nor is it disputed that the documents obtained by the plaintiff pursuant to a FOIA request were not produced by defendants in response.

Finally, with respect to the third factor, evidence concerning the relationship between the county and the jail could have had an impact on the Court's summary judgment decision. Furthermore, in light of the Fourth Circuit's decision in *Schultz*, we do not find persuasive defendants' argument that the documents at issue relate only to an audit undertaken pursuant to statute and have no bearing on the independent authority of the Sheriff to manage the jail. Because the discovery of these documents might have led counsel to additional evidence, there is a sufficient basis on which to grant Rule 60(b) relief, even if the documents themselves are not "result altering."

Appendix B

For these reasons, plaintiff's Motion for Relief Pursuant to Fed. R. Civ. P. 60(b) and for Supplementation of the Record and Supplemental Motion for Relief Pursuant to Fed. R. Civ. P. 60(b)(3) Relating to the Supervisory Capacity of the Loudoun County Board of Supervisors are GRANTED, and it is hereby

ORDERED that those portions of the Court's Orders dated February 13, 1997, and April 7, 1997, in which the Court granted summary judgment in favor of the defendants on Counts III and IV of the Complaint be and are VACATED; and it is further

ORDERED that discovery be and is re-opened in this action on the limited issues raised in plaintiff's motion and supplemental motion for a period not to exceed forty-five (45) days from the date of this Order. If at the close of discovery either party wishes to move for summary judgment as to Counts III and IV, such motion must be filed no later than August 10, 1998, and noticed for argument in accordance with the Local Rules of this Court.

The Clerk is directed to forward copies of this Order to counsel of record.

Entered this 5th day of June, 1998.

s/ Leonie M. Brinkema
Leonie M. Brinkema
United States District Judge

Alexandria, Virginia

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION DATED AND FILED APRIL 7, 1997

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 96-726-A

CATHERINE L. HOY, Guardian for KEVIN BROWN,

Plaintiff,

v.

STEPHEN O. SIMPSON, *et al.*,

Defendants.

MEMORANDUM OPINION

On February 13, 1997, the Court granted in part and denied in part various summary judgment motions of the parties, in an order which indicated that the reasons for the rulings would be spelled out in more detail in a memorandum opinion to be issued in the future. On February 18, 1997, the Court issued another order modifying this ruling.

The ensuing trial, in which the jury found in favor of the defendants on all remaining counts mooted any need to discuss the complex damages issues raised in these motions.

However, this opinion will further elaborate on the Court's granting of summary judgment to the defendants on Counts III and IV, and address the plaintiff's post-trial motions.

I. Summary Judgment on Counts III and IV

Count III alleged a deprivation of constitutional rights because of the Board of Supervisors' and the Sheriff's failure to train the deputies with respect to how to treat intoxicated detainees. Count IV charged that the Board and the Sheriff's failure to adopt policies and procedures with respect to intoxicated detainees violated Brown's constitutional rights.

A finding that Brown's constitutional rights were violated under these counts requires a finding that the Sheriff and the Board acted with deliberate indifference rather than mere negligence. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 389, 109 S.Ct. 1197, 1205 (1989). Deliberate indifference is a high standard; "liability under § 1983 attaches where — and only where — a deliberate choice to follow a course of action is made from among various alternatives" by policymakers. Hoy must show both "contemporaneous knowledge of the offending incident or knowledge of a prior pattern of similar incidents," and "circumstances under which the supervisor's inaction could be found to have communicated a message of approval to the offending subordinate." *Boyd v. Harper*, 702 F.Supp. 578, 581 (E.D.Va. 1988) (finding no deliberate indifference on the part of a county sheriff for a failure to provide training on treatment of suicidal detainees in suit by estate of detainee who committed suicide).

Appendix C

It is undisputed that neither the Sheriff nor the Board knew about Kevin Brown's situation at the time he was incarcerated nor was there any evidence in the record showing that similar problems with intoxicated inmates had occurred. Hoy has also not presented any evidence that the Sheriff or the Board made a deliberate choice not to adopt policies or conduct training on treatment of intoxicated detainees.

The more detailed policies of surrounding jurisdictions are not evidence of such a deliberate choice. Hoy consistently argues that because surrounding jurisdictions such as Fairfax County have far more detailed policies addressing how to handle intoxicated inmates, Loudoun County's failure to have similar policies is relevant evidence of deliberate indifference. Case law does not support that argument; plaintiff has cited no cases where the policies or procedures of other jurisdictions were dispositive. That Sheriff Simpson may have been aware of the policies of the other jurisdictions does not prove that he made a deliberate choice "almost certain to result in a deprivation of Brown's civil rights," as the plaintiff alleges. *See* Plaintiff's Reply to Defendants' Opposition to Plaintiff's Motion for Partial Summary Judgment at 4. Plaintiff's conclusion does not account for differences among jurisdictions, including population size and budget considerations.

On March 15, 1995, the Loudoun County Sheriff's Office was certified for compliance with approved standards for jails by the Virginia Department of Corrections. *See* Defendants' Exhibit 73. Compliance with state regulations is relevant to the § 1983 inquiry, *Reid v. Kayye*, 885 F.2d

129 (4th Cir. 1989) (suit against state prison officials), although it is not necessarily conclusive. Hoy argued that the Loudoun County Adult Detention Center was not in compliance with state regulations. *See* Plaintiff's Supplemental Motion to Reconsider Ruling of February 13, 1997, which Regard to Count III of the Amended Complaint. However, Hoy does not dispute that the jail had been accredited. Regardless, the failure to comply with a state regulation is not a constitutional violation. *Davis v. Scherer*, 468 U.S. 183, 196 (1984), *Street v. Surdyka*, 492 F.2d 368, 370 (4th Cir. 1974) (noting that "not all violations of state law rise to the level of a constitutional tort for purposes of civil rights statute"). The policies and procedures of Loudoun County did not result in an unconstitutional deprivation of Kevin Brown's civil rights.

II. Plaintiff's Post-Trial Motions

Plaintiff made three post-trial motions, all of which are denied. Plaintiff's Motion for a New Trial Based on Newly Acquired Information addresses an incident on Friday, February 28, 1997, in which another inmate at the Loudoun County Adult Detention Center, Gregory Green, who was held in a single cell, had an asthma attack in the jail at 8:20 p.m.. He allegedly received CPR at the jail and was taken to Loudoun County Hospital, where he died.

In support of her motion, plaintiff has attached an affidavit from the inmate in an adjoining cell, Johnny VanNess, who alleges that the inmate next door to him was having trouble breathing. VanNess claims he and other inmates expressed their concerns to several deputies. They

were told that he was sleeping. VanNess says he heard one deputy yell out, "This guy is dead."

Under Rule 59, the Court may grant a new trial only if the new evidence is competent and relevant, and will probably change the prior result. *Boryan v. United States*, 884 F.2d 767, 771 (4th Cir. 1989). Hoy has not shown that this new evidence is competent or relevant. Lieutenant Mark Davis also supplied an affidavit in which he indicates that Green was housed in Cell Block 4 on the ground floor in the northwest corner, while VanNess was in Single Cell 1 which is on the third floor on the northeast side. Lt. Davis also states that Green had been seen by the nurses at the jail several times that day, and that contact had been maintained with the physician. According to Davis, the response to Green was immediate.

Nonetheless, even if the incident had occurred exactly as plaintiff claims, it would not justify a new trial. It is well established that to justify the grant of a new trial on the basis of newly discovered evidence, the evidence must have been in existence at the time of trial. *Boyd v. Bulala*, 672 F.Supp. 915 (W.D. Va. 1987), *N.L.R.B. v. Jacob E. Decker and Sons*, 569 F.2d 357 (5th Cir. 1978). Even if the Green incident had occurred before the trial instead of several days after it, it would only warrant a new trial if it occurred before Kevin Brown's incarceration. Otherwise it could not have affected how the defendants acted with respect to Kevin Brown. Hoy is not entitled to a new trial based on this alleged incident.

Plaintiff has also filed a Motion for New Trial Pursuant to Rule 59 of the Federal Rules of Civil Procedure, by Virtue

of (1) the Court's Failure to Instruct the Jury in Accordance with the Standard Established in *Farmer v. Brennan* and *Brice v. Virginia Beach Correctional Center*; (2) the Court's failure to instruct the Jury in Accordance with Plaintiff's Proposed Instructions; and (3) the Court's Erroneous, Misleading and Confusing Instructions. This Motion is denied because the instructions were proper in all respects.

Hoy argues that the Court did not instruct the jury properly on deliberate indifference because the Court did not state that not heeding an obvious danger would constitute deliberate indifference, and because the Court implied that the jury had to find intentional misconduct. The plaintiff wanted this instruction, among others:

> Actual knowledge of the risk and intentional or reckless failure to address it must be proven. On the other hand, a jailor cannot hide behind the excuse that he or she was unaware of the risk no matter how obvious. (Plaintiff's Proposed Instruction Number 23).

The plaintiff obtained the language from *Brice v. Virginia Beach Correctional Center*, 58 F.3d 101, 108 (4th Cir. 1995).

Although the Court did not quote verbatim from *Brice*, it believes the ruling in *Brice* was essentially and adequately communicated to the jury. The Court instructed the jury, in part, that

> deliberate indifference may be demonstrated by either actual intent or reckless disregard. A person

> acts recklessly by disregarding a substantial risk of danger that is either known to the person or which would be apparent to a reasonable person in that position. (Transcript of Jury Instructions at 106).

The Court believes that the phrase "would be apparent to a reasonable person in that position" means essentially the same as "obvious." Therefore, the jury was told that if a defendant disregarded an obvious serious medical need he could be held liable.

In the next paragraph, in describing serious medical need, the Court told the jury it would include a condition either diagnosed by a physician or "one that is so obvious that a layperson would easily recognize the necessity for a doctor's attention." (Transcript at 106). Again, the Court made it clear that a defendant could not escape liability if the need were obvious.

Shortly after these instructions the Court defined intentional acts and told the jury that in determining what a person knew or intended the jury had to "depend on what was done and on what the people involved said was on their minds and [the jury's] belief or disbelief with respect to those facts." (Transcript at 107). Therefore, if the jury believed that a defendant could not have reasonably believed what he said he believed, based on the evidence, the jury could find that defendant liable.

The test for deliberate indifference was set out in *Farmer v. Brennan*, 511 U.S. 825, 114 S.Ct. 1970 (1994). The Court quoted almost directly from this case:

Appendix C

> [T]he plaintiff has the burden of showing that . . . each defendant had both been aware of facts from which the inference could be drawn that a substantial risk of serious harm existed and that the individual deputy sheriff also must have drawn such an inference. (Transcript at 105).

See Farmer v. Brennan, 114 S.Ct. at 1979 ("the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.") Thus the Court's instructions on deliberate indifference were proper.

In the same motion, Hoy also objects to the Court's decision not to give some of its proposed instructions and to give one of the defendant's instructions and alleges that the Court's instructions were erroneous, misleading and confusing. None of these state grounds for a new trial, and the entire motion is denied.

Hoy's final pretrial motion is titled Motion for a New Trial Pursuant to Rule 59 of the Federal Rules of Civil Procedure, by Virtue of the Court's Failure to Disclose its Ruling on Proposed Jury Instructions as Required by Rule 51 of the Federal Rules of Civil Procedure. Because the Court followed the rules, this motion is also denied.

Plaintiff claims that she should have been given a copy of the jury instructions in advance of closing arguments. At the charging conference, counsel was told, "You don't get my instructions in advance. That's not our practice." Federal Rule of Civil Procedure 51 does not require that the parties

receive an actual copy. It only requires that the parties be allowed to tender proposed instructions and that the Court convene a charging conference:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in these requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court, at its election, may instruct the jury before or after argument, or both. Fed. R. Civ. P. 51.

The Court followed this rule by convening the charging conference, in which it informed the parties of the substance of the instructions.

For these reasons, plaintiff's post-trial motions are denied and summary judgment was proper with respect to Counts III and IV.

The Clerk is directed to forward copies of this Memorandum Opinion to counsel of record.

Entered this 7th day of April, 1997.

s/ Leonie M. Brinkema
Leonie M. Brinkema
United States District Judge

Alexandria, Virginia

Appendix C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 96-726-A

CATHERINE L. HOY, Guardian for KEVIN BROWN,

Plaintiff,

v.

STEPHEN O. SIMPSON, *et al.*,

Defendants.

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that plaintiff's Motion for a New Trial Based on Newly Acquired Information, Motion for New Trial Pursuant to Rule 59 of the Federal Rules of Civil Procedure, and Motion for a New Trial Pursuant to Rule 59 of the Federal Rules of Civil Procedure be and are DENIED.

The Clerk is directed to forward copies of this Order to counsel of record.

Entered this 7th day of April, 1997.

s/ Leonie M. Brinkema
Leonie M. Brinkema
United States District Judge

Alexandria, Virginia

APPENDIX D — JUDGMENT ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION DATED AND FILED FEBRUARY 24, 1997

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

CIVIL ACTION NO. 96-726-A

CATHERINE L. HOY, Guardian for Kevin Brown,

Plaintiff,

v.

STEVE A. SIMPSON, SHERIFF OF
LOUDOUN COUNTY, *et al.*,

Defendants.

JUDGMENT ORDER

In light of the verdicts of the jury, it is hereby

ORDERED, ADJUDGED and DECREED that judgment be and is entered in favor of defendants Ken Dondero, Trula Peach, Lance Schul, James Drummond, Shannon M. Daly, Michael Cox, and Jack Bradley on Counts 1, 2 and 6; and Steve A. Simpson, Sheriff of Loudoun County on Count 6, and it is further

ORDERED, ADJUDGED and DECREED that judgment be and is entered in favor of defendants Ken Dondero, Trula

Appendix D

Peach, Lance Schul, James Drummond, Shannon M. Daly, Michael Cox, Jack Bradley and Steve A. Simpson, Sheriff of Loudoun County, on Count 7 pursuant to Fed. R. Civ. P. 50(a)(1).

The Clerk is directed to forward copies of this Judgment Order to counsel of record.

Entered this 24th day of February, 1997.

s/ Leonie M. Brinkema
Leonie M. Brinkema
United States District Judge

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION DATED AND FILED FEBRUARY 18, 1997

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 96-726-A

Catherine Hoy, Guardian for Kevin Brown,

Plaintiff.

v.

Stephen O. Simpson, Sheriff of
Loudoun County, *et al.*,

Defendants.

ORDER

The Court issued an Order on February 13, 1997, partially granting summary judgment to the defendants and denying summary judgment to the plaintiffs. The Court also made a specific ruling on the damages to which the plaintiff is entitled. After reconsideration, the Court has determined that the issue of damages should be deferred until liability has been determined, and it is hereby

ORDERED that the February 13, 1997 Order be and is VACATED insofar as it limited plaintiff to recovery of

damages for pain and suffering. The trial will be held in two phases, with liability to be considered first. The Court will reissue a ruling on the damages.

The Court also vacates its entry of summary judgment in favor of the Sheriff on Counts VI and VII. Count VI alleges gross negligence. Gross negligence is "the utter disregard of prudence amounting to complete neglect of the safety of another." *Frazier v. City of Norfolk*, 362 S.E.2d 688, 691 (1987). The defense of sovereign immunity is not available for this count.

Count VII charges simple negligence. The deputies retain the defense of sovereign immunity for this count. Determining whether sovereign immunity applies requires a four-part test. *James v. Jane*, 282 S.E.2d 864 (1980). The factors are (1) the nature of the function performed by the employee; (2) the extent of the governmental entity's interest and involvement in the function; (3) the degree of control and direction exercised by the governmental entity over the employee; and (4) whether the alleged wrongful act involved the exercise of judgment and discretion. If the jury finds that the deputies are liable for Counts VI or VII, the Sheriff will be vicariously liable because the doctrine of respondeat superior applies with equal force to government employers and employees. *First Virginia Bank-Colonial v. Baker*, 301 S.E.2d 8, 12 (Va. 1983). Therefore, it is hereby

ORDERED that the February 13, 1997 Order be and is VACATED insofar as it granted summary judgment in favor of the Sheriff on Counts VI and VII. The Sheriff will be liable only if the deputies are held liable. The portions of

Appendix E

Counts VI and VII which allege liability of the Sheriff for failure to train or set particular policies, specifically paragraphs 88 and 91, have been eliminated from this lawsuit through the previous summary judgment ruling.

The portion of the February 13, 1997 Order which granted summary judgment to the Loudoun County Board of Supervisors on Counts VI and VII remains unchanged because it appears from the complaint that the Board of Supervisors was not explicitly named as a defendant in these counts. However, even if the Board had been included, there is not a sufficient employment relationship between the Board and the deputies to impose vicarious liability on the Board.

The Clerk is directed to forward copies of this Order to counsel of record.

Entered this 18th day of February, 1997.

s/ Leonie M. Brinkema
Leonie M. Brinkema
United States District Judge

Alexandria, Virginia

APPENDIX F — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION DATED FEBRUARY 13, 1997

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 96-726-A

Catherine Hoy, Guardian for Kevin Brown,

Plaintiff.

v.

Stephen O. Simpson, Sheriff of Loudoun County, *et al.*,

Defendants.

ORDER

This matter is before the Court on defendants' Motion for Summary Judgment and plaintiff's Motion for Summary Judgment on Count III. For the reasons that are briefly stated below and will be fully discussed in a memorandum opinion to be issued in the future, the defendants' Motion is DENIED in part and GRANTED in part and the plaintiff's Motion is DENIED.

As a preliminary matter, it is noted that the plaintiff brought this suit against the Sheriff and the deputies in their

individual and official capacities. Because the Sheriff and his deputies are state officials, they are entitled to the protection of the Eleventh Amendment and the doctrine of sovereign immunity from suits against them in their official capacities. Therefore, the suit can proceed against these individuals only in their individual, or personal, capacities.

Counts I and II

The Court denies summary judgment for Deputies Peach, Schul, Cox, Daly, Drummond, Dondero and Bradley on Counts I and II for deprivation of civil rights under 42 U.S.C. § 1983.

To prove a violation of 42 U.S.C. § 1983, the plaintiff must show that the deputies were deliberately indifferent to Kevin Brown's constitutional rights. "[T]he official must both be aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer v. Brennan*, 114 S.Ct. 1970, 1979 (1994). *See also Brice v. Virginia Beach Correctional Center*, 58 F.3d 101 (4th Cir. 1995). Qualified immunity attaches only if a reasonable deputy sheriff possessing the same information as the defendants could have believed that his or her conduct was not in violation of clearly established federal law. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity is also not available to officials whose subjective intent was to harm a plaintiff or who knew or should have known that their conduct violated constitutional rights. While these are high standards, the plaintiff has made a sufficient evidentiary showing to avoid summary judgment. The extent to which each deputy was

aware of information about the plaintiff's condition and the exact nature of the acts each defendant took are in dispute. Thus, on this record, the Court cannot adequately determine whether a reasonable deputy sheriff similarly situated would have believed that his or her actions violated the Constitution. This determination remains a factual question to be resolved at trial. It cannot be concluded from this record that no reasonable jury could find for the plaintiff. A jury will be able to assess the credibility of the deputies in open court in a way that the Court cannot at this stage, and determine the liability, if any, of each deputy.

The plaintiff has named the Board of Supervisors and the Sheriff in Counts I and II. Because these parties had no direct role in the incident and were not aware of any previous problems with the jail's treatment of intoxicated inmates, and given the short period of time the Sheriff had been in his position, summary judgment is GRANTED to the Board and Sheriff Simpson on Counts I and II.

Counts III and IV

The Court finds that there is no genuine issue of material fact as to whether the Loudoun County Board of Supervisors or Sheriff Simpson can be found liable for violations of 42 U.S.C. § 1983. There is no evidence in the record that the Board of Supervisors exercised policy-making control over the Sheriff's Department. Furthermore, the Loudoun County Adult Detention Center had been accredited by the Virginia Board of Corrections, which provides the only certification required by law. The failure to adopt a policy to determine whether intoxicated persons at the Adult Detention Center

need medical attention is not, on this record, a constitutional deprivation of due process. Therefore, the defendants' Motion for Summary Judgment is GRANTED with respect to Counts III and IV.

Counts VI and VII

Because this Court grants summary judgment in favor of Sheriff Simpson on Counts I, II, III and IV, it follows that Summary Judgment should be entered in favor of the Sheriff on the state law negligence claims in Counts VI and VII.

The Court finds that Counts VI and VII track Counts I and II with respect to the individual deputies, and summary judgment is, therefore, DENIED.

Damages

The defendants have demonstrated that Kevin Brown's medical expenses have been paid, and will continue to be paid, for the rest of his life, by Medicaid. Medicaid is funded through the state treasury. Any recovery in this case would also come from the state treasury. Under Virginia law, the Sheriff and his deputies are state, not county, officers. *Hilton v. Amburgey*, 96 S.E.2d 151, 152 (1957), *Narrows Grocery v. Bailey*, 170 S.E. 730, 732 (1933). These state officers are insured by the Virginia Risk Assessment Management Plan. Therefore, the tortfeasor and the secondary source of compensation are the same. In addition, there is insufficient evidence that Brown contributed to the Medicaid fund as a taxpayer. His record of employment is scant. Even if it were not, and he had paid taxes in Virginia for many years, courts

have not found that the payment of taxes is sufficient to establish that Medicaid is a collateral source. *See District of Columbia v. Jackson*, 451 A.2d 867 (D.C. App. 1982). Therefore, under the Virginia common law collateral source doctrine, plaintiff is barred from recovery of any past or future medical expenses from these defendants.

The plaintiff's remaining element of compensable damages is for pain and suffering. The defendants have argued that as a matter of law, plaintiff cannot recover any such damages, because he is in a vegetative state and cannot establish that he has some cognitive answers. *Bulala v. Boyd*, 389 S.E.2d 670 (Va. 1990), citing *McDougald v. Garber*, 73 N.Y.2d 246 (1989). Plaintiff counters this argument with the late tendered affidavit of Dr. Sheldon Marguiles who asserts sufficient facts to create a triable issue.

Therefore, this case will go to trial solely against deputy sheriffs Peach, Schul, Cox, Daly, Drummond, Dondero and Bradley, on Counts I, II, VI and VII. In the trial, plaintiff is limited to recovery for pain and suffering.

The Clerk is directed to forward copies of this Order to counsel of record.

Entered this 13th day of February, 1997.

s/ Leonie M. Brinkema
Leonie M. Brinkema
United States District Judge

Alexandria, Virginia

APPENDIX G — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JULY 23, 1999

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 97-1583
CA-96-726-A

CATHERINE L. HOY, Guardian for Kevin A. Brown

Plaintiff – Appellant

v.

STEVE A. SIMPSON, Sheriff of Loudoun County; DANIEL DONDERRO; TRULA PEACH; LANCE SCHUL; JAMES DRUMMOND; SHANNON M. DALY; THE LOUDOUN COUNTY BOARD OF SUPERVISORS; MICHAEL COX; JACK BRADLEY; JEFFREY FRAGALA; UNKNOWN SHERIFF'S DEPUTIES

Defendants – Appellees

No. 98-2605
CA-96-726-A

CATHERINE L. HOY, Guardian for Kevin A. Brown

Plaintiff – Appellant

v.

Appendix G

STEVE A. SIMPSON, Sheriff of Loudoun County; DANIEL DONDERRO; TRULA PEACH; LANCE SCHUL; JAMES DRUMMOND; SHANNON M. DALY; THE LOUDOUN COUNTY BOARD OF SUPERVISORS; MICHAEL COX; JACK BRADLEY; JEFFREY FRAGALA; UNKNOWN DEPUTIES

Defendants – Appellees

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denies.

For the Court,

/s/ Patricia S. Connor
CLERK

APPENDIX H — VERDICT FORMS OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA DATED AND FILED FEBRUARY 24, 1997

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

CIVIL ACTION NO. 96-726-A

CATHERINE L. HOY, Guardian for Kevin Brown,

Plaintiff,

v.

MICHAEL COX,

Defendant.

VERDICT

We, the jury, unanimously find that the plaintiff, Catherine L. Hoy, guardian for Kevin A. Brown, has proven by a preponderance of the evidence that defendant Michael Cox violated the civil rights of Kevin Brown by denying him medical treatment for a known serious medical need.

[ ] Yes [✓] No

Appendix H

We, the jury unanimously find that the plaintiff, Catherine L. Hoy, guardian for Kevin A. Brown, has proven by a preponderance of the evidence that defendant Michael Cox violated the civil rights of Kevin Brown by being deliberately indifferent to a known serious medical need.

[ ] Yes [✓] No

We, the jury unanimously find that the plaintiff, Catherine L. Hoy, guardian for Kevin A. Brown, has proven by a preponderance of the evidence that defendant Michael Cox was grossly negligent in his handling of Kevin Brown.

[ ] Yes [✓] No

s/ Scott M. Lang
Foreperson
Scott M. Lang

Date: 2/24/97

Appendix H

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

CIVIL ACTION NO. 96-726-A

CATHERINE L. HOY, Guardian for Kevin Brown,

Plaintiff,

v.

JACK BRADLEY,

Defendant.

VERDICT

We, the jury, unanimously find that the plaintiff, Catherine L. Hoy, guardian for Kevin A. Brown, has proven by a preponderance of the evidence that defendant Jack Bradley violated the civil rights of Kevin Brown by denying him medical treatment for a known serious medical need.

[ ] Yes [✓] No

We, the jury unanimously find that the plaintiff, Catherine L. Hoy, guardian for Kevin A. Brown, has proven by a preponderance of the evidence that defendant Jack Bradley violated the civil rights of Kevin Brown by being deliberately indifferent to a known serious medical need.

[ ] Yes [✓] No

Appendix H

We, the jury unanimously find that the plaintiff, Catherine L. Hoy, guardian for Kevin A. Brown, has proven by a preponderance of the evidence that defendant Jack Bradley was grossly negligent in his handling of Kevin Brown.

[ ] Yes [✓] No

s/ Scott M. Lang
Foreperson
Scott M. Lang

Date: 2/24/97

Appendix H

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

CIVIL ACTION NO. 96-726-A

CATHERINE L. HOY, Guardian for Kevin Brown,

Plaintiff,

v.

JAMES DRUMMOND,

Defendant.

VERDICT

We, the jury, unanimously find that the plaintiff, Catherine L. Hoy, guardian for Kevin A. Brown, has proven by a preponderance of the evidence that defendant James Drummond violated the civil rights of Kevin Brown by denying him medical treatment for a known serious medical need.

[ ] Yes [✓] No

We, the jury unanimously find that the plaintiff, Catherine L. Hoy, guardian for Kevin A. Brown, has proven by a preponderance of the evidence that defendant James Drummond violated the civil rights of Kevin Brown by being deliberately indifferent to a known serious medical need.

[ ] Yes [✓] No

Appendix H

We, the jury unanimously find that the plaintiff, Catherine L. Hoy, guardian for Kevin A. Brown, has proven by a preponderance of the evidence that defendant James Drummond was grossly negligent in his handling of Kevin Brown.

[ ] Yes [✓] No

s/ Scott M. Lang
Foreperson
Scott M. Lang

Date: 2/24/97

Appendix H

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

CIVIL ACTION NO. 96-726-A

CATHERINE L. HOY, Guardian for Kevin Brown,

Plaintiff,

v.

LANCE SCHUL,

Defendant.

VERDICT

We, the jury, unanimously find that the plaintiff, Catherine L. Hoy, guardian for Kevin A. Brown, has proven by a preponderance of the evidence that defendant Lance Schul violated the civil rights of Kevin Brown by denying him medical treatment for a known serious medical need.

[ ] Yes [✓] No

We, the jury unanimously find that the plaintiff, Catherine L. Hoy, guardian for Kevin A. Brown, has proven by a preponderance of the evidence that defendant Lance Schul violated the civil rights of Kevin Brown by being deliberately indifferent to a known serious medical need.

[ ] Yes [✓] No

Appendix H

We, the jury unanimously find that the plaintiff, Catherine L. Hoy, guardian for Kevin A. Brown, has proven by a preponderance of the evidence that defendant Lance Schul was grossly negligent in his handling of Kevin Brown.

[ ] Yes [✓] No

s/ Scott M. Lang
Foreperson
Scott M. Lang

Date: 2/24/97

Appendix H

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

CIVIL ACTION NO. 96-726-A

CATHERINE L. HOY, Guardian for Kevin Brown,

Plaintiff,

v.

KEN DONDERO,

Defendant.

VERDICT

We, the jury, unanimously find that the plaintiff, Catherine L. Hoy, guardian for Kevin A. Brown, has proven by a preponderance of the evidence that defendant Ken Dondero violated the civil rights of Kevin Brown by denying him medical treatment for a known serious medical need.

[ ] Yes [✓] No

We, the jury unanimously find that the plaintiff, Catherine L. Hoy, guardian for Kevin A. Brown, has proven by a preponderance of the evidence that defendant Ken Dondero violated the civil rights of Kevin Brown by being deliberately indifferent to a known serious medical need.

[ ] Yes [✓] No

Appendix H

We, the jury unanimously find that the plaintiff, Catherine L. Hoy, guardian for Kevin A. Brown, has proven by a preponderance of the evidence that defendant Ken Dondero was grossly negligent in his handling of Kevin Brown.

[ ] Yes [✓] No

s/ Scott M. Lang
Foreperson
Scott M. Lang

Date: 2/24/97

Appendix H

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

CIVIL ACTION NO. 96-726-A

CATHERINE L. HOY, Guardian for Kevin Brown,

Plaintiff,

v.

SHANNON M. DALY,

Defendant.

VERDICT

We, the jury, unanimously find that the plaintiff, Catherine L. Hoy, guardian for Kevin A. Brown, has proven by a preponderance of the evidence that defendant Shannon M. Daly violated the civil rights of Kevin Brown by denying him medical treatment for a known serious medical need.

[ ] Yes [✓] No

We, the jury unanimously find that the plaintiff, Catherine L. Hoy, guardian for Kevin A. Brown, has proven by a preponderance of the evidence that defendant Shannon M. Daly violated the civil rights of Kevin Brown by being deliberately indifferent to a known serious medical need.

[ ] Yes [✓] No

Appendix H

We, the jury unanimously find that the plaintiff, Catherine L. Hoy, guardian for Kevin A. Brown, has proven by a preponderance of the evidence that defendant Shannon M. Daly was grossly negligent in his handling of Kevin Brown.

[ ] Yes [✓] No

s/ Scott M. Lang
Foreperson
Scott M. Lang

Date: 2/24/97

Appendix H

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

CIVIL ACTION NO. 96-726-A

CATHERINE L. HOY, Guardian for Kevin Brown,

Plaintiff,

v.

TRULA PEACH,

Defendant.

VERDICT

We, the jury, unanimously find that the plaintiff, Catherine L. Hoy, guardian for Kevin A. Brown, has proven by a preponderance of the evidence that defendant Trula Peach violated the civil rights of Kevin Brown by denying him medical treatment for a known serious medical need.

[ ] Yes [✓] No

We, the jury unanimously find that the plaintiff, Catherine L. Hoy, guardian for Kevin A. Brown, has proven by a preponderance of the evidence that defendant Trula Peach violated the civil rights of Kevin Brown by being deliberately indifferent to a known serious medical need.

[ ] Yes [✓] No

Appendix H

We, the jury unanimously find that the plaintiff, Catherine L. Hoy, guardian for Kevin A. Brown, has proven by a preponderance of the evidence that defendant Trula Peach was grossly negligent in his handling of Kevin Brown.

[ ] Yes [✓] No

s/ Scott M. Lang
Foreperson
Scott M. Lang

Date: 2/24/97

Supreme Court, U.S.
FILED
DEC 17 1999
CLERK

No. 99-698

IN THE

Supreme Court of the United States

CATHERINE L. HOY, Guardian for Kevin Brown,

Petitioner,

v.

STEVE O. SIMPSON, Sheriff of Loudoun County, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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Respondents Steve O. Simpson, Sheriff of Loudoun County, *et al.*, by counsel, respectfully submit that Catherine L. Hoy's Petition for Writ of Certiorari should be denied, and the Court should decline to review this case.

OPINIONS BELOW

The April 7, 1997 Memorandum Opinion and Order of the United States District Court for the Eastern District of Virginia and the July 25, 1999 *per curiam* Opinion of the United States Court of Appeals for the Fourth Circuit are set forth in the Appendix to Hoy's Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

This Court has jurisdiction based on 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The 42 U.S.C. § 1983 lawsuit underlying this Petition arose from the unanticipated medical emergency of Kevin Brown during his detention at the Loudoun County Adult Detention Center ("ADC") in Leesburg, Virginia. Petitioner Catherine L. Hoy, Guardian for Kevin Brown ("Hoy"), has asserted that respondents, Sheriff Simpson, the Loudoun County Board of Supervisors and various named deputies ("Simpson") violated Mr. Brown's constitutional rights through denial of medical treatment, were deliberately indifferent to Brown's medical needs, failed to train deputies or adopt proper policies, failed to provide an adequate facility, used excessive force, and are liable under pendant state law claims of negligence and gross negligence. The pertinent facts are set forth in the *per curiam* Opinion of the United States Court of Appeals for the Fourth Circuit, which

is Appendix A of Hoy's Petition. In her effort to attract this Court's attention, Hoy attempts to force-fit the underlying facts to inapposite legal issues to create controversy where none exists. The following procedural history is relevant to the pending Petition and demonstrates why the Court should decline to review this matter.

This action was filed in the United States District Court for the Eastern District of Virginia on May 23, 1996. In the following months Hoy undertook extensive discovery including twenty-one depositions, nearly half of which were continued beyond one day's testimony. The case was thoroughly litigated, including petitioner's unsuccessful *Daubert* challenge attempting to exclude the testimony of Simpson's medical expert.[1] In all, the Sheriff's policies and procedures, training, facilities, the actions of all assigned deputies, the medical evidence and the etiology of Brown's brain injury were subject to thorough and extensive discovery prior to trial.

On February 13, 1997, the district court granted partial summary judgment on Simpson's motion under Fed. R. Civ. Pro. Rule 56. The district court dismissed the Loudoun County Board of Supervisors as a party defendant, as well as Hoy's claims for failure to adopt proper policies (Count III) and for failure to provide an adequate facility (Count IV). Hoy voluntarily dropped her claim for excessive force. On February 18, 1997 the case proceeded to trial against Sheriff Simpson and seven named deputies on the

1. *See Daubert v. Merrell Dow*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). Hoy attempted to bar the testimony of Simpson's medical expert who diagnosed Brown's injury as a result of a seizure disorder known as status epilepticus. This testimony disproved Hoy's theory that the onset of Brown's medical condition began at or soon after the time of his booking at the ADC.

two remaining counts under 42 U.S.C. § 1983 and the pendant state law claims. Following a five-day trial the jury deliberated less than two and one-half hours before rendering its verdict in favor of all defendants on all counts.

Following the trial, and Hoy's subsequent Motion for a New Trial under Fed. R. Civ. Pro. Rule 59, petitioner filed her appeal with the United States Court of Appeals for the Fourth Circuit. On February 13, 1998, one year after the district court's grant of partial summary judgment, Hoy filed a motion under Fed. R. Civ. Pro. Rule 60(b) wherein she sought to amend the record and present argument during the appeal hearing related to what she characterized as "newly discovered evidence." Hoy also requested that she be permitted to explore the issue of the Sheriff's compliance with Virginia Department of Corrections standards based upon a 1994 document that was obtained from that agency by a Freedom of Information Act (FOIA) request. However, having filed her Rule 60 motion in the wrong court, the Court of Appeals remanded the matter to the district court. Thereafter, Hoy argued that her "newly discovered evidence" might bear some relevance to the certification status of the ADC at the time of Brown's detention in March 1996. Hoy also speculated that the Sheriff's policy of allowing newly hired deputies to serve at the ADC violated Department of Corrections Standards for training.

On June 5, 1998, Judge Leonie Brinkema vacated the district court's ruling of summary judgment[2] as to Count III

2. Judge Brinkema, in an abundance of caution, granted appellant's Rule 60 Motion despite the following factors: 1) Hoy never actually requested the Department of Corrections information in discovery; 2) the Department of Corrections report from 1994 (Cont'd)

(failure to train deputies or adopt proper policies) of the First Amended Complaint, and she ordered a re-opening of discovery for the limited purpose of exploring the issues raised by Hoy in her motion. Judge Brinkema reasoned that potential evidence of a defect in the Sheriff's policy or of failure to comply with Department of Corrections Standards, with notice to the policymakers, could possibly amount to genuine issues of fact that at least arguably might have made granting summary judgment on Count III inappropriate. The district court opined that although the ADC's March 1995 unconditional certification issued by the Virginia Department of Corrections created a presumption that the jail was in compliance with all applicable standards, Hoy could conceivably demonstrate that in March 1996 the jail was operated in violation of proper policies and procedures, and thereby rebut the presumption.

Based on the foregoing, the district court granted Hoy a forty-five day discovery period to explore these issues related to the ADC's certification status in March 1996; and specifically, whether the defendant deputies' training status remained in compliance with appropriate regulations mandated by the Virginia Department of Criminal Justice Services at times material. The district court instructed that at the end of this discovery period the parties would re-visit summary judgment on the policy/training claim. Despite the court's admonition in the June 5, 1998 Order that the

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(Cont'd)
was not maintained by the Sheriff's Office or Loudoun County. The 1994 report, which ultimately was of no relevance to the issues in this case, was provided from archival records from the Department of Corrections under a FOIA request; and 3) the subject report was superceded by the unconditional certification awarded the Loudoun County ADC by the Department of Corrections in March 1995.

discovery was to be limited, and the guidance and constraints imposed under a subsequent Protective Order, Hoy undertook an all-out assault on the Sheriff's Office and the Loudoun County government with extensive and far-reaching discovery. In addition to the discovery initiated before trial, Hoy undertook an additional sixteen depositions and mired the district court with a steady barrage of specious and unnecessary discovery motions related to her attempt to retry the case. After conducting virtually unlimited discovery, Hoy was forced to confront the reality that in every area the ADC remained fully certified at the time of Brown's detention in March 1996. No evidence of any defect in Simpson's policies was found. However, rather than accept defeat, or acknowledge her failure to produce a single relevant fact in support of the bald allegations levied in the Rule 60 motion, Hoy then changed tactics and opted to file a Second Amended Complaint to avoid a re-hearing on the pending summary issues previously briefed under Rule 56.

These efforts notwithstanding, the district court easily recognized that the "new" claims included in the Second Amended Complaint were simply a rehashing of theories that were raised previously, and were not supported by any new facts obtained as a result of the Rule 60 remand. Following the extensive discovery effort in the prior forty-five day period, Hoy was well aware that there were no facts with which to support a claim that Sheriff Simpson was non-compliant with Department of Corrections Standards, or that the Sheriff had failed to discharge any responsibilities regarding ADC training or policy. Faced with the shortcomings of her massive discovery effort, Hoy included allegations of fact that she knew to be false. Simpson then filed a Motion to Strike based on the false pleading and a Motion to Dismiss pursuant to Fed. R. Civ. Pro.

Rule 12(b)(6). After careful consideration of all facts brought forward, the district court granted Simpson's Motion to Dismiss.[3] For the reasons that Simpson consistently argued since the pre-trial phase of the case, Judge Brinkema determined that Hoy's pleading was deficient on its face, and that insufficient facts were pled to support Hoy's training/policy claims. The issues were then addressed in a Supplemental Brief to the Fourth Circuit which made its ruling on all issues related to the case on June 25, 1999.[4]

The Petition Misrepresents Critical Facts Of This Case.

Any chance for success Hoy has on her present Petition depends upon this Court being misled as to key facts of record. That is, Hoy's present argument is largely premised on claims that are clearly at odds with evidence presented to the district court and to the jury at trial. These mischaracterizations of fact include:

- The assertion that "*the deputies who performed the intake . . . did not do a medical screening*" (Petition, p. 2) is false. Sgt. Trula Peach, the booking officer and shift supervisor at the time of Brown's intake, testified at trial that she in fact performed a medical assessment on Brown which included his rate of

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3. Respondents' Motion to Dismiss was granted on October 2, 1998. The Motion to Strike based on Rule 11 was deemed moot.

4. The Court of Appeals has remanded a single issue to the district court regarding its treatment of the pendant state law claims against Sheriff Simpson in his individual capacity. The district court, which has stayed its proceedings pending Hoy's Petition to this Court, will be asked to resolve a narrow factual issue based on the existing record to complete the grounds for final dismissal.

respiration (18 breaths per minute) and other medically significant data based on her direct observation and interaction with Brown during the one hour period that transpired while awaiting the magistrate (J.A. 1906).[5] Sgt. Peach is a certified Emergency Medical Technician with thirty years experience in rescue operations (J.A. 1862).

- The assertion that "*Brown remained unconscious in the isolation cell for the next twenty-two hours*" (Petition, p. 2) is unsupported by the record. Hoy's frequent use of the inflammatory word "unconscious" has remained a theme throughout this case. However, all the deputies who monitored Brown denied that he was unconscious, that he showed any sign of distress, or that he demonstrated any need for medical care (J.A. 146, 1799, 1807, 1811, 1830, 1851, 1989, 2353, 2365). In fact, the testimony was consistent that Brown was sleeping off his intoxication in the single cell where he was placed for his safety and protection (J.A. 1986).

- The claim that Brown was "*vomiting blood*" (Petition, p. 3) is purposefully misleading and untrue. The record from trial shows that Brown demonstrated no sign of distress until 5:25 a.m. on March 25, 1996. At that time Deputy Bradley observed Brown struggling to breathe, a behavior that was not consistent with Brown's condition throughout the night (J.A. 2029, 2030, 2441, 2442). Sgt. Daly responded immediately and observed

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5. Joint Appendix designated for the Fourth Circuit, including trial transcript.

Brown vomiting or spitting what appeared to be clear fluid, lightly tinged with some blood (J.A. 2055). Sgt. Daly testified that Brown was awake and made a spitting gesture with his mouth. Moreover, when a flashlight was shined in Brown's eyes, he responded by moving his head and backing away from the light (J.A. 147, 2025).

- The assertion that "*Plaintiff's experts stated that the policy and training failures at the jail proximately caused Mr. Brown's coma*" (Petition, p. 4) is untrue. In fact, Hoy's neurological expert, Dr. Sheldon Margulies, conceded that Brown's injury occurred close to 5:30 a.m., the time when the deputies summoned emergency medical assistance. Hoy's expert also admitted that the sub-clinical seizures (meaning not observable) associated with status epilepticus would not be recognizable to the deputies and he would not fault them for their failure to notice such an occurrence (J.A. 2182, 2183, 2193, 2198). Hoy's corrections expert, Dr. Richard Kiekbusch, testified generally that the deputies failed to exercise "common sense and good judgment" when assessing the needs of the inmate (J.A. 2525-2528, 2548). Dr. Kiekbusch conceded that a deputy's prior knowledge of a particular detainee is an important element in their assessment of the detainee's condition (J.A. 2537). The record was clear that Brown was in fact very well-known to the ADC, and his habit of intoxication was thoroughly documented. Dr. Kiekbusch's testimony was instrumental in the dismissal of Hoy's negligence claims against the deputies.

- In what is perhaps the most egregious misstatement of fact, petitioner asserts "*Brown 's permanent brain damage was caused by anoxia (or loss of oxygen to the brain) when he aspirated vomit while unconscious . . .*" (Petition, p. 3). This was not even an issue at trial since it was disproved early in the discovery process. In fact, all of Brown's chest x-rays were negative for any type of aspiration (J.A. 149, 234, 243). Brown's treating physician, Dr. Anil Patel, (who petitioner did not call to testify at trial) and respondent's medical expert, Dr. Peter Bernad, agreed that Brown suffered from the condition known as status epilepticus (J.A. 2567-2570). Furthermore, Brown's ultimate vegetative state was the result of a stroke he suffered while in the hospital.[6] (J.A. 241, 2603).

- The claim that "*The totality of the policies and procedures regarding intoxicated inmates at the Loudoun County Jail . . . consisted of one sentence*" (Petition, p. 3) is categorically untrue. Hoy's deliberate understatement of the ADC Training Manual (pertaining to physical head counts during a shift change) is intentionally misleading. Hoy's representation of Simpson's policies is completely unfair and ignores several crucial facts, which are well-established in this case: 1) the Sheriff's policies and procedures (General Orders) require the collection of medical information, General Order 704.03, and performance of an initial medical

6. The evidence at trial indicated the emergency staff at Loudoun Hospital Center did not initially recognize Brown's status epilepticus, and the anti-seizure medication administered there may have been too little, too late.

screening, General Order 704.23; 2) General Orders 704.10 and 706.01 provide for sick call and immediate access to medical attention when needed; 3) General Orders 704.6 and 708.15 address medical concerns for inmates associated with alcohol withdrawal and required isolation for monitoring purposes; 4) ADC staff were instructed on the positioning and monitoring of intoxicated detainees; 5) Brown was placed in a single cell in close proximity to the booking desk for purposes of observation and monitoring; 6) the ADC's contract physician, Dr. James Towe, was available to the staff at all times; 7) the deputies' first-aid training provided by the Northern Virginia Training Academy consisted of a forty-three hour course. The minimum training standard mandated by the Virginia Department of Criminal Justice Services is just eight hours; and significantly, 8) the Sheriff's policies and procedures were certified and in compliance with Virginia Department of Corrections Standards.

- The assertion that "*in months after Mr. Brown's incident, only 5 of 30 deputies were trained in basic first aid*" (Petition, p. 5) is false and intentionally misleading. Simpson demonstrated conclusive proof that in March 1996 all ADC staff was trained as mandated by Title 6 of the Virginia Administrative Code. Hoy's after-the-fact reference is simply indicative of the prevailing effort to taint the record with false and irrelevant claims.

The Petition Fails To Include Critical Facts Relative To This Case.

Much of this case revolves around Hoy's claim that on March 24, 1996 Brown was in no condition to be admitted to the Loudoun County ADC, and that his intoxication required immediate hospitalization. The Sheriff's alleged failure to implement policy for the proper handling of intoxicated detainees is claimed to be indicative of a pervasive deliberate indifference to Brown.[7] However, lost in this argument are several key facts that the district court relied upon in finding that Hoy failed to state a case for supervisory liability on the training/policy claim. These factors include:

- Brown is a resident of Loudoun County, Virginia. He was a chronic criminal offender in that jurisdiction, and was generally well-known to the staff of the Loudoun County ADC. Brown was a polysubstance abuser, and was repeatedly treated at the Loudoun County Mental Health Center for his alcohol addiction and abuse of illegal narcotics (J.A. 140, 155-159).

- The events leading up to the circumstances of this litigation are noteworthy since Brown was arrested

7. Petitioner has frequently argued (without the benefit of cited authority) that "upwards of 50% of new detainees at the jail are drunk", thus anything less than detailed and specific policies addressing the needs of intoxicated inmates amounts to deliberate indifference. This curious reasoning is easily belied by the fact that despite the numerous cases of intoxicated inmates booked at the Loudoun County ADC, Brown's medical condition presented the first such occurrence, ever.

for public intoxication twice within thirty hours on the weekend of March 22-24, 1996. On the evening of Friday, March 22, 1996, Brown was arrested by Town of Leesburg police and jailed at the Loudoun County ADC on a charge of drunk in public (J.A. 182, 183). This was the fifteenth time he had been jailed on these charges (J.A. 166, 187).

- When Brown was again arrested on March 24, 1996, only approximately sixteen hours had elapsed following his previous release from the jail. Brown was wrestled into the jail by Town of Leesburg police (J.A. 2671). He was screaming, shouting obscenities, and he continued his belligerence throughout his booking (J.A. 142, 1844, 1845, 1880, 1884, 2237). At no time was he abused or mistreated in any way (J.A. 2263).

- Brown was well-known to most of the ADC staff, especially Sgt. Peach, who having twenty years experience as a correctional officer, had dealt with Brown on many occasions (J.A. 1861, 1948). Brown had previously been jailed for various offenses in excess of thirty times (J.A. 1947, 1948).

- Brown was uncooperative during his booking. Sgt. Peach testified that Brown had a habit of "faking sleep" during the times when he was both uncooperative and non-confrontational (J.A. 1871, 1872, 1880, 1946).

- During the booking procedure Brown was assisted by Deputy Michael Cox, who is also a trained Emergency Medical Technician. Deputy Cox

testified that Brown was not unconscious or in medical or physical distress (J.A. 144, 2259, 2262).

- During his detention, Brown was monitored in his single cell at least twice every hour (J.A. 186). The deputies testified that Brown slept soundly on his bunk, and was snoring audibly as he had on every other occasion in the jail. They noted slight changes in his position on the bunk throughout the shift, and there was no sign of medical distress or breathing difficulty that required medical attention until his medical emergency at 5:25 a.m. when an ambulance was immediately summoned and arrived at 5:35 a.m. (J.A. 1799, 1807, 1811, 1830, 1851, 2355).

- Dr. Towe, the ADC's contract physician, testified that the deputies call him almost every day regarding their concern for detainees' possible medical problems (J.A. 2679). He testified that he would not ordinarily expect to receive a call regarding an individual who is breathing normally and sleeping off the effects of intoxication. However, in the event he did receive such an inquiry, Dr. Towe would instruct the staff to continue to monitor the inmate (J.A. 2680, 2687).

The Petitioner's Case At Trial Failed To Demonstrate Any Causal Relationship Between Brown's Injury And The Alleged Actions Of The Respondents.

Hoy's current Petition follows the pattern of her written submissions at every stage of this case where the factual record is outrageously mischaracterized. This is particularly true with her misstatement of the facts related to Brown and

his detention at the Loudoun County ADC. Hoy's central theme in this case, from the initial filing through the Fourth Circuit arguments, was that Brown was comatose when admitted to the jail; that Brown was not intoxicated, but rather presented to the ADC as a medical emergency; that he suffered an anoxic injury after aspiration of vomit shortly after being placed in a single cell; and was delivered to the hospital having suffered a profound brain injury. Petitioner argues in conclusory fashion that but for the dearth of policy and training, Brown would not be in his present vegetative state. However, despite the overriding attempt to taint the issues before this Court, the record developed through discovery and trial presents an entirely different scenario. Hoy was unable to establish any causal relationship between Brown's injury and any of the alleged actions by the Sheriff or his deputies.

The medical evidence became a "chicken and egg" issue over whether Brown's sub-clinical seizures (which continued for some period of time after his hospitalization) led to his brain injury, or the injury was manifested by seizures (which were only evident through an EEG). This issue became an academic debate between the medical experts since both parties' doctors confirmed that Brown's emergency occurred sometime between 5:00 a.m. and 5:20 a.m., within minutes of when the deputies noted Brown's labored breathing and spitting over the side of his bunk. The deputies immediately summoned emergency medical assistance in response to Brown's sudden change of condition. There is no dispute in the evidence that the prompt action of the ADC staff in detecting Brown's distress gave him the best chance under the circumstances of one suffering from status epilepticus.

Hoy may not infer a policy, or lack thereof, merely because Brown suffered a medical emergency while in custody. The evidence presented at trial clearly demonstrated that the deputies summoned emergency assistance immediately upon discovering Brown's distress. Brown incurred injuries in spite of the efforts of the Loudoun County ADC staff, not as a result of them or the alleged deficiencies of their training regimen.

REASONS FOR DENYING THE WRIT

Hoy's Petition attempts to impose some element of strict liability for Brown's medical emergency during his detention at the jail. While the seven counts levied against Simpson and his deputies ran the spectrum of claims associated with many prisoner civil rights claims, the continued prosecution of this case presents a classic example of trying to force a square peg into a round hole. Petitioner has expended a tremendous effort throughout the appeal process searching for a theory as to why she has been prejudiced by the dismissal of her supervisory claims against the Loudoun County Sheriff. Here, Hoy has seized upon legal issues which simply do not fit the facts of this case.

The District Court's Dismissal Of Petitioner's Training/ Policy Claim Was Appropriate Under The Law.

Hoy's supervisory claim against Simpson alleged a failure to train deputies or adopt proper policies in violation of 42 U.S.C. § 1983. Hoy contends that neither the Sheriff's Department nor Sheriff Simpson provided adequate training to the deputies on duty at the Loudoun County ADC.

Specifically, Hoy focuses on the monitoring of medical needs for intoxicated individuals. These claims are completely unsupported by the undisputed facts developed through extensive pre-trial and post-trial discovery. The district court properly dismissed this claim since: 1) Sheriff Simpson's policies and procedures were deemed adequate and subject to the approval of the audit and review personnel with the Virginia Department of Corrections; 2) the Loudoun County ADC remained unconditionally certified in March 1996 by the Virginia Department of Corrections; 3) the ADC had *no prior incidence* of a medical emergency of this nature to support an inference of deliberate indifference or violation under 42 U.S.C. § 1983; 4) Hoy's claims ignored both the level of skill and training of the individual deputies assigned to the ADC; and 5) Hoy's training claim was based solely on inadmissible evidence which sought to compare Sheriff's Simpson's policies with those of other jurisdictions.

A finding that Brown's constitutional rights were violated under the supervisory claims would have required a finding that Sheriff Simpson acted with deliberate indifference rather than mere negligence. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989). Deliberate indifference is a high standard; "liability under § 1983 attaches where — and only where — a deliberate choice to follow a course of action is made from among various alternatives" by policymakers. *Id.* Hoy must show both "contemporaneous knowledge of the offending incident or knowledge of a prior pattern of similar incidents," and "circumstances under which the supervisor's inaction could be found to have communicated a message of approval to the offending subordinate." *Boyd v. Harper*, 702 F. Supp. 578, 581 (E.D. Va. 1988) (finding no deliberate indifference on the part of a county sheriff for a failure to provide training on treatment of suicidal detainees).

During the course of her appeals Hoy has argued that a "pattern" of prior violations is unnecessary to establish liability, and she focuses on dicta in *Board of County Commissioners of Bryan County v. Brown*, 520 U.S. 397, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997). This case involved the liability of an Oklahoma county for its alleged failure to adequately screen applicants for the position of deputy sheriff in connection with a claim of excessive force. The *Brown* decision was a "failure to screen" rather than an "inadequate training" case, and the decision found an attempted analogy between these two types of cases to be unpersuasive. *Brown* points out the difference between the two classes of cases and the difficulties of attempting to draw parallel reasoning between the two. Moreover, *Brown* reiterated the burden that, "a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." *Id.* 117 S. Ct. at 1388. *Brown* reads *City of Canton* as saying that a single violation of federal rights *might* trigger § 1983 liability where accompanied by a failure to train employees to handle *recurring situations* presenting an obvious potential for such violations. But even then the violation must be a "highly predictable consequence of the failure to train" to justify a finding of deliberate indifference. *Id.* at 1389. In this case there was no evidence whatsoever that Brown's medical emergency was part of a recurring situation. Accordingly, a single violation would be insufficient to establish § 1983 liability for failure to train.

Simpson has correctly argued that Hoy must establish multiple incidents in order to allege a violation under § 1983 for failure to train and adopt policies at the Loudoun County ADC. "A single act or isolated incidents are normally

insufficient to establish supervisory inaction upon which to predicate § 1983 liability." *Wellington v. Daniels*, 717 F.2d 932, 938 (4th Cir. 1983). "Multiple incidents are required for a finding of deliberate indifference." *Fiacco v. Rensselaer*, 783 F.2d 319, 327 (2nd Cir. 1986).

> Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) unless there is evidence of supervisory indifference, such as acquiescence in a prior matter of conduct, or proof that the incident was caused by an existing, unconstitutional municipal policy, which can be attributed to a municipal policy maker.

Oklahoma City v. Tuttle, 471 U.S. 808, 105 S. Ct. 2427, 85 L. Ed. 2d 791 (1985). It is undisputed that in this case, there is *no* evidence of improper or inadequate training of subordinates; there is also no evidence or allegation of multiple or widespread constitutional violations due to deliberate indifference on the part of Sheriff Simpson. A showing that individual officers violated a person's constitutional rights on an isolated occasion is not "sufficient to raise an issue of fact whether adequate training and procedures were provided." *Orpriano v. Johnson*, 632 F.2d 1096, 1101 (4th Cir. 1980) (*citations omitted*).

Much like the respondent in *Brown*, Hoy attempts to blur the distinction between § 1983 cases that present no difficult questions of fault and causation and those that do. In *Brown*, this Court reaffirmed that:

> To the extent that we have recognized a cause of action under § 1983 based on a single decision attributable to a municipality, we have done so only where the evidence that the municipality had acted and that the plaintiff had suffered a deprivation of federal rights also proved fault and causation.

Id. 117 S. Ct. at 1389. Here, the issue is moot in any event since the jury found no violation of Brown's constitutional rights when it rendered its verdict in favor of the Loudoun County deputies as to both claims under § 1983, as well as Hoy's pendant claim of gross negligence levied against the deputies and Sheriff Simpson. Thus there was no "violation of federal rights" as a necessary predicate to a showing that there was a failure to train the deputies to handle recurring situations. Moreover, as demonstrated by the medical evidence, there was no causal relationship between Brown's injury and the alleged indifference to his condition while he slept in the jail absent any signs of distress or indicia of a medical emergency.

There Is No Confusion Over The Application Of *City of Los Angeles v. Heller*.

Hoy, largely avoiding the primary issue of her appeal to the Fourth Circuit concerning prior incidents needed to establish a claim of supervisory liability, now insists that the Fourth Circuit's reliance on *City of Los Angeles v. Heller*[8] creates a conflict that this Court should now address. Hoy argues that lower courts apply *Heller* in divergent ways; however, she is misplaced in arguing that this amounts to a

8. 475 U.S. 796, 106 S. Ct. 1571, 89 L. Ed. 2d 806 (1986).

split of authority. Instead, the cases relied upon by Hoy are fact-bound and easily reconciled.

More importantly, Hoy complains that *Heller* is offensive to the administration of justice and promotes the notion of "*non respondeat inferior*" (Petition, p. 12) and instances whereby civil defendants divide and conquer by means of "*chicanery*" (Petition, p. 6) and "*fraudulently-obtained bifurcated trial, where the sheriff and the county were conspicuously absent*" (Petition, p. 14). This entire line of argument is inapposite to this case since there was no bifurcation of any issues related to liability.[9] Instead, Hoy litigated her case extensively against Sheriff Simpson, the Loudoun County Board of Supervisors, and seven named deputies. Moreover, based upon the specious representations attendant to Hoy's Rule 60 motion, the district court vacated its summary decision on the training claim, and Hoy was allowed a second opportunity to discover and litigate her claims against the Sheriff and the County. Hoy's current argument is highly suspect since she had unprecedented opportunity to make a claim against these parties. In fact, the second bite of the apple resulted in even more claims in the form of Hoy's Second Amended Complaint. However, in the final analysis Hoy simply could discover no facts which could properly support a claim for supervisory liability.

The Fourth Circuit's reliance on *Heller* simply underscored the fact that allegations of the policymaker's deliberate indifference cannot exist in a vacuum. Without

9. Just prior to trial, the district court bifurcated only the damages portion of this case pending its consideration of Simpson's motion barring all damages since, in this instance, Medicaid payments were not subject to the Collateral Source Rule.

cause and injury the claim is nothing more than an academic exercise, or hypothetical analysis of policies that have consistently passed muster by the Commonwealth of Virginia's reviewing authority. According to this Court's decision in *Brown*, the *Heller* doctrine is sound since supervisory liability requires some form of municipal action wherein the plaintiff suffered a deprivation of federal rights with proof of fault and causation. *Brown*, 117 S. Ct. at 1389. Hoy's criticism over the application of *Heller* notwithstanding, the facts of this case do not merit any manner of review. Hoy was granted liberal opportunities to discover every nuance of the Sheriff's Office and the Loudoun County government. After two and one-half years she developed no facts to support any inference of policy or training deficiencies against Sheriff Simpson or his deputies. The ample record demonstrates that in March 1996, the deputies were fully trained under the mandates of Title 6 of the Virginia Administrative Code, and the regulations promulgated by the Virginia Department of Criminal Justice Services and the Virginia Department of Corrections. Moreover, the Sheriff's policies were inclusive of the Department of Corrections unconditional certification of the Loudoun County ADC. Hoy can show no facts to support her bald allegation of training deficiencies, no facts of inadequate policies, and no causation for the injury suffered by Brown.

Since there was no constitutional violation by the deputies, or any causal relationship with the injury, there can be no claim that the Sheriff's policies were responsible. Thus is revealed the fundamental flaw of Hoy's latest arguments.

Petitioner Cannot Demonstrate Any Prejudice Over Jury Instructions

Since the time of Hoy's Motion for a New Trial under Rule 59 through the appeal to the Fourth Circuit, Hoy has advanced three separate arguments over the jury instructions at trial. In the analysis of each, Hoy has failed to demonstrate any manner of prejudice based on the record as a whole as required by *Wellington v. Daniels*, 717 F.2d 932, 938 (4th Cir. 1983). As articulated in the *per curiam* decision of the Fourth Circuit, the sum of the limited mention of qualified immunity amounted to nothing more than harmless error. The doctrine was not emphasized to the jury, did not come up throughout the trial, and was not incorporated in the closing arguments by either party. Despite Hoy's prior claims that the district court misstated the law applicable to deliberate indifference, petitioner is unable to demonstrate any prejudice as related to any instructions offered by the trial court.

The lack of prejudice under the district court's instructions is also demonstrated by Hoy's pendant state law claim for gross negligence. The fact that Hoy did not prevail on this separate claim requiring an utter disregard of caution, is clearly indicative that the jury could not have found deliberate indifference which is required for liability under the civil rights claims. This reasoning makes obvious that the jury never considered the qualified immunity instruction. Hoy also fails to demonstrate any prejudice related to the instruction since the verdict forms were not general forms, and in fact served as special interrogatories on this subject. Again, with no finding of gross negligence or deliberate indifference, the jury never reached the issue of defense to Counts I and II. Moreover, any complaints over the verdict

forms are deemed waived since Hoy has never previously brought that issue forward on appeal.

Hoy can hardly complain that the qualified immunity issue was buried in the jury instructions as opposed to being ruled upon by the district court. Recall that Judge Brinkema viewed this as a "weak case," and it is doubtful that Hoy's claims would have survived to go to the jury had the judge ruled on this issue. Hoy's dubious argument is particularly transparent considering that the instruction went in without objection,[10] and Hoy is complaining now only because she did not get the result she wanted.

Clearly, under either scenario maintained by Hoy, she has failed to demonstrate any prejudice whatsoever in the instruction given; nor is there any reversible error when the record is considered as a whole pursuant to the standard required by *Wellington*, *supra*.

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10. As noted by the Court of Appeals, Hoy failed to properly note her objection to the court's instructions at trial. The parties were given an opportunity to be heard on the instructions, but Hoy, perhaps for tactical purposes, did not object or request that the court take up the issue of qualified immunity. *See Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 112 (4th Cir. 1991); *Jerlyn Yacht Sales, Inc. v. Roman Yacht Brokerage*, 950 F.2d 60, 66 (1st Cir. 1991) (simply referring by number to a request filed prior to the charge is not sufficient to preserve an objection to the court's failure to give the requested instruction); *United States v. Lachmann*, 469 F.2d 1043, 1044 (1st Cir. 1972), *cert. denied*, 411 U.S. 931 (1973) ("mere blanket enumeration of requests by number is, *prima facie*, not enough").

CONCLUSION

The record in this case is abundantly clear that the district court afforded Catherine Hoy every opportunity to be heard on her claims, including a generous grant whereby Hoy was given a second chance to refine her claims and present evidence justifying the re-opening of an already over-litigated case. Hoy came up short after engaging in what can only be described as extraordinary discovery efforts. The appeal process pursued by counsel once again has shifted the direction of argument with the present Petition to this Court trying to force the application of legal principles that have no bearing on the facts developed below. For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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(3)

No. 99-698

Supreme Court, U.S.
DEC 29
CLERK

IN THE

Supreme Court of the United States

CATHERINE L. HOY, Guardian for KEVIN A. BROWN,

Petitioner,

v.

STEVE A. SIMPSON, SHERIFF OF LOUDOUN COUNTY; DANIEL DONDERO; TRULA PEACH; LANCE SCHUL; JAMES DRUMMOND; SHANNON M. DALY; THE LOUDOUN COUNTY BOARD OF SUPERVISORS; MICHAEL COX; JACK BRADLEY; JEFFREY FRAGALA; Unknown Sheriff's Deputies,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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One searches Respondents' Brief in Opposition in vain to find much that actually addresses the questions presented for review in the Petition: (1) whether *City of Los Angeles v. Heller*, 475 U.S. 796 (1986) ["*Heller*"], was correctly applied here; and (2) whether the issue of qualified immunity should be submitted to a jury. Petitioner submits that Respondents have missed the point of the Petition: to resolve the split of authority among the Courts of Appeals on these two important civil rights issues and to achieve a measure of justice for Petitioner through a full trial of all of her claims on remand.

I. BECAUSE OF THE ELEMENT OF SUBJECTIVE INTENT FOR LINE OFFICERS IN DELIBERATE INDIFFERENCE CIVIL RIGHTS CLAIMS, *CITY OF LOS ANGELES v. HELLER* SHOULD NOT BAR APPELLATE REVIEW OF DISMISSAL OF *MONELL/CANTON* POLICY AND FAILURE TO TRAIN CLAIMS AGAINST SUPERVISORS AND MUNICIPALITIES.

In this case, the appeal of the District Court's dismissal of the supervisory policy and training claims under *Monell/Canton*[1] regarding the handling of intoxicated inmates was never decided on the merits because the Fourth Circuit ruled that *Heller* precluded such review, "even if Appellant *could* establish that the County was deliberately indifferent under *Canton v. Harris*." (Appendix at 23a; emphasis in original).

Respondents' lengthy (and often intemperate) exegesis notwithstanding, Petitioner is confident that she would have prevailed in reversing the dismissal had the point been reached, given: (1) the surfeit of evidence supporting

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1. *Monell v. Department of Social Services*, 436 U.S. 658 (1978); *Canton v. Harris*, 489 U.S. 378 (1989).

Respondents' policy and training defects regarding intoxicated inmates (including the defendant sheriff's own admissions); and (2) her entitlement to have the evidence and all reasonable inferences therefrom viewed in the light most favorable to her before her supervisory claims can be taken from the jury.[2] The test is not whether the plaintiff's prospects for recovery are remote or unlikely nor whether she will ultimately prevail. Rather, the issue is whether the claimant is entitled to offer evidence to support her claim. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1973).[3]

In this regard, the Fourth Circuit certainly did not find the trial evidence on the issues actually allowed to be litigated to be as one-sided as Respondents stridently maintain:

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2. These principles, which Respondents ignore in reciting their version of the facts and expert testimony as if they had won a *verdict* on the policy and training claims instead of a dismissal, are a venerable foundation of the right to trial by jury guaranteed by the Seventh Amendment. A case must proceed to trial "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-6 (1957); *see also Hughes v. Rowe*, 449 U.S. 5, 10 (1980); *Miree v. DeKalb Co.*, 433 U.S. 25, 27 n.2 (1977); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Cruz v. Beto*, 405 U.S. 319, 322 (1972); *Haines v. Kerner*, 404 U.S. 519, 520-1 (1972).

3. In this respect, Respondents' *ad hominem* attacks on Petitioner and her counsel — *see, e.g.*, "purposefully misleading" [Opp. Brief at 7]; "egregious misstatement of fact" [Opp. Brief at 9]; "outrageously mischaracterized" [Opp. Brief at 13] — are not only inaccurate themselves but quite inappropriate. Petitioner has presented the facts in the light most favorable to her, as she is entitled to do when her claim at issue was dismissed pursuant to Fed. R. Civ. P. 12(b)(6). There has been no attempt to mislead the Court. *Respondents* are the only parties in this case found by the District Court to have engaged in fraud — a finding that they did not appeal. Appendix at 29a-30a.

> Brown's exact condition at the time of his booking and throughout this [twenty-two hour] period was a matter of some dispute at trial, but there is no doubt that he was highly intoxicated and spent most, if not all, of that time either asleep or unconscious.

Appendix at 4a.

Indeed, the Fourth Circuit's affirmance of the District Court's dismissal of the policy and training claims was not based on the evidence, as Respondents urge here. The Court of Appeals noted, albeit in *dicta*, that it was "dubious that such a determination could legitimately be made as a matter of law from the four corners of the complaint." Appendix at 23a. Instead, the Fourth Circuit believed that its reviewing authority on the merits was circumscribed by *Heller*. Other Courts of Appeals have ruled similarly, thus creating the split of appellate authority.

Although Respondents declare that the cases cited by Petitioner as constituting the "Circuit-split" on the application of *Heller* are "fact-bound and easily reconciled" [Opp. Brief at 20], they make no attempt to show this. They also offer no response to Petitioner's argument that the Courts of Appeals are in disarray as to whether *Heller* should apply at all when, as here, the constitutional tort at issue has a subjective intent element, such that the individual officers' liability could be negated by what they did not know (and therefore failed subjectively to intend). That such lack of subjective intent could result from ignorance due to lack of training separates *Heller* from the *objective* constitutional tort cases where it had its genesis.

Heller was a police excessive force case. At that time, the lower courts were evaluating such claims under both the substantive "due process" clause of the Fourteenth Amendment

and under the "unreasonable seizure" clause of the Fourth Amendment. The proper test, unresolved in *Heller*, was addressed by the Court three years later in *Graham v. Connor*, 490 U.S. 386 (1989), wherein the Court grounded excessive force claims solely in the Fourth Amendment and applied an objective standard:

> Whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation . . . [such that] [a]n officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional.

Id. at 397 (citations omitted). By contrast, an Eighth Amendment claim for deliberate indifference, such as Petitioner's, "puts in issue the subjective motivations of the individual officers," which has "no bearing . . . under the Fourth Amendment." *Id.*:

> Differing standards under the Fourth and Eighth Amendments are hardly surprising: the terms "cruel" and "punishments" clearly suggest some inquiry into subjective state of mind, whereas the term "unreasonable" does not.

Id. at 398.

Petitioner submits that the Fourth Circuit here, like some other Courts of Appeals that have applied *Heller* to subjective intent constitutional torts, has acted too broadly. Respectfully, these Courts of Appeals have failed to recognize the distinction between objective intent constitutional torts, where (to use *Heller's* phrase) the vindication of the officers means "in fact"

that no constitutional tort occurred, since the officers' subjective intent was irrelevant; and subjective intent constitutional torts, where absence of subjective intent through lack of training can provide a complete defense without saying anything about whether "in fact" a constitutional tort occurred.

In an objective intent constitutional tort, such as excessive force, a finding objectively that there was no police misconduct truly renders the officers' training irrelevant, even if deficient. Colloquially put, the supervisors and county "get a pass" for being lucky on that occasion. In a deliberate indifference case, however, medical care could be denied but the officers could be exonerated because they were not trained to recognize a predictable risk, and thus subjectively, meant no harm.[4]

The extension of *Heller* to subjective constitutional torts is particularly pernicious when defendants obtain bifurcation of the *Monell/Canton* claims such that a verdict for the untrained line officers who unknowingly failed to perform their duties prevents the supervisory claims from ever being heard.[5] Here,

4. Respondents' argument that an alleged lack of similar prior incidents precludes Petitioner's *Monell/Canton* claim was also presented to the Court of Appeals, but the Fourth Circuit did not rely upon it. In any event, the point of a "prior incidents" argument is to show that the supervisory defendants had notice of the need to correct policy and training, which existed here because Virginia regulatory authorities called the county's training deficiencies to its attention repeatedly prior to the injury to Kevin Brown. Moreover, "evidence of a single violation of federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious risk for such a violation could trigger" liability. *Board of County Commissioners v. Brown*, __ U.S. __, 117 S. Ct. 1382, 1385 (1997), *quoting Canton v. Harris*, 489 U.S. 373, 388 (1989).

5. Respondents thus misunderstand the bifurcation issue, when they present it as a separation of liability and damages. [Opp. Brief (Cont'd)

as found by the District Court, Respondents obtained such bifurcation at trial by fraudulently withholding evidence of supervisory liability. That the Court of Appeals would rely on *Heller* to affirm the dismissal of these claims only adds salt to the wound.

The unleashing of *Heller* from its original mooring by some appellate courts has allowed it to drift into areas of constitutional law where it has no logical basis, including its extreme application here. The Court should set the matter right.

II. QUALIFIED IMMUNITY SHOULD NOT BE A JURY QUESTION.

Respondents also ignore the split of appellate authority on whether a District Court should instruct juries on qualified immunity. This issue was implicit last term in *Snyder v. Trepagnier*, __ U.S. __, 119 S. Ct. 863 (1999), where the Court granted certiorari in a Louisiana case to resolve the conundrum in which a jury, using a special verdict form, found that police used excessive force but were also entitled to qualified immunity — both issues involving an objective analysis of police conduct under the law and facts at the time and illustrating the problem of giving the qualified immunity question to a jury. As noted, this case settled after issuance of the writ but before it was heard by the Court. The "Circuit-split" on instructing on qualified immunity remains, however.

Respondents' argument that qualified immunity is irrelevant because it was not emphasized before the jury [Opp. Brief at 22] ignores the basic thrust of their defense (that the deputies did the best they could under the circumstances and meant no harm) and the rule that juries are *presumed* to act

(Cont'd)

at 20]. It is the severance of the untrained defendants from those defendants responsible for the training that creates the mischief of which Petitioner complains.

in accordance with their instructions. *Heller*, 475 U.S. at 798. Because special interrogatories on the defenses of subjective intent and qualified immunity were not submitted to the jury, it is impossible to determine on appeal whether the jury's finding for the line officers was based on the merits of Petitioner's claims or on one or more of Respondents defenses.[6]

In short, the District Court should not have instructed on this issue, and its presentation to the jury merely added to the error of removing the sheriff and the county from the case. It unfairly increased the likelihood of a defense verdict for the line officers that had nothing to do with the merits of whether Kevin Brown was illegally denied proper medical care, and the instruction without a special verdict form precluded proper appellate review. The Court should resolve the conflict in the Courts of Appeals on this question by holding that judges, not juries, should decide qualified immunity.

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6. Respondents' assertion that the verdict forms *were* special interrogatories [Opp. Brief at 22] is incorrect. The forms merely separated the causes of action, not the defenses. [Appendix at 55a, *et seq.*]. Respondents' suggestion that this point was not preserved by timely objection is also inaccurate. Objection was made. Moreover, the Court of Appeals found that Petitioner did the best she could to preserve her objections to the qualified immunity charge in light of the District Court's "vague statements" about its intended instructions and a charging conference that fell "considerably short of the mandatory requirements" of F.R.C.P. 51. [Appendix at 20a-22a].

CONCLUSION

The essential question in this case is not whether the untrained deputies did their best to summon help once Kevin Brown's condition became an obvious emergency even to the untrained. The issue, which the jury never heard, is whether proper policies and training would have prevented Mr. Brown from *becoming* an emergency through timely medical intervention in a situation that is repeated daily in our nation's jails. The legal issues on which certiorari is sought exist on a very human landscape of helpless and often desperately ill people, who, whatever their offenses, are entitled under our laws and this Court's decisions to basic dignity in custody, to medical treatment, and to a day in court.

Respectfully submitted,

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